CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1937

No. 41

STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONER,

vs.

THE UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 7, 1937.

CERTIORARI GRANTED OCTOBER 11, 1937.

SUPREME COURT OF THE UNITED STATES

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vs.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 18, 1937.

[fol. a] [Caption omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Proceedings in the United States District Court in and for the Southern District of Florida in a Certain Cause Therein, Wherein United States of America, for the use and Benefit of L. R. Powell, Jr. and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a Corporation, is Plaintiff, and Standard Accident Insurance Company, a Corporation Organized and Existing under the Laws of the State of Michigan, of Detroit, Michigan, is Defendant. Case No. 3420-T. Civil.

[fol. 2] DECLARATION—Filed February 14, 1936

Come now L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a corporation organized and existing under the laws of the State of Virginia and other states, and bring this suit under and in accordance with the Act of August 13, 1894—28 Statute of the United States, 278; 40 U. S. C. A., Sec. 270, and amendments thereto, giving the Court jurisdiction, and allege as follows:

I.

That L. R. Powell, Jr. and Henry W. Anderson are Receivers of the Seaboard Air Line Railway Company, a corporation, pursuant to appointment of the United States District Court of the Eastern District of Virginia and the United States District Court for the Southern District of Florida in Ancillary proceedings, and as such have charge of the accounts of said Seaboard Air Line Railway Company.

II

That on the 25th day of January, 1933, Joseph A. Tintari entered into a certain written contract with the United States of America for the construction, including approaches, of the post office at Sarasota, Florida, for the consideration of $136,000; that is and by said contract the said Joseph A. Tintari was to furnish all material and labor in the construction of said post office.

[fol. 3] III

That to secure the performance of said contract the said Joseph A. Tintari, as principal, and the Standard Accident Insurance Company, a corporation organized and existing under the laws of the state of Michigan, of Detroit, Michigan, as surety, did on the 30th day of January, 1933, enter into a certain bond or writing obligatory under seal with the said United States of America, in the penal sum of $70,000 as will more fully appear from copy of said bond or writing obligatory attached hereto, marked Exhibit "A", and by express reference made a part of this declaration; that said copy of said bond was furnished by the Assistant Comptroller General of the United States to the plaintiff as provided by law. That in and by said bond the said Standard Accident Insurance Company became obligated and bound to promptly pay to all persons supplying the said Joseph A. Tintari with labor and material in the prosecution of the work provided by the above mentioned contract between Joseph A. Tintari, all in accordance with the obligations imposed on the said Joseph A. Tintari and the Standard Accident Insurance Company by the statutes of the United States of America.

IV

That L. R. Powell, Jr. and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company furnished certain labor and services to the said Joseph A. Tintari in the prosecution of the work and furnishing of material provided for in and by the said contract between the said Joseph A. Tintari and the United States of America. That the said labor and services so furnished by the use-plaintiff were supplied to Joseph A. Tintari at Sarasota, Florida, on divers dates, to-wit: September 26, 1933, Octo-
[fol. 4] ber 19, 1933, October 21, 1933, November 7, 1933, and November 10, 1933, as is more fully set forth in freight bills attached hereto, marked Exhibit "B", and by reference made a part hereof, to-wit:

No. 4091 for	$68.04
No. 4092 for	70.53
No. 4095 for	62.70
No. 4522 for	251.72
No. 4563 for	62.97

No. 4564 for	62.26
No. 5242 for	62.15
No. 5243 for	60.28
No. 5244 for	62.37
No. 5334 for	87.40
Making a total of	$850.42

That no part of said debt has been paid except $442.28, leaving a balance of $408.14, and that there are no setoffs or counter claims to the last mentioned amounts. That the said labor and services so furnished were used by the said Joseph A. Tintari in the prosecution and the performance of the work provided in the aforementioned contract between the said Joseph A. Tintari and the United States of America.

V

Plaintiff further alleges that no suit was brought by the United States of America within six months from the completion and final settlement of said contract, final settlement having been made June 25, 1933, less than one year before bringing this suit.

VI

Plaintiff herein further avers that all time elapsed and all things were done and performed to entitle use-plaintiff [fol. 5] herein to payment unto it by said Joseph A. Tintari and this defendant Standard Accident Insurance Company, of use-plaintiff's said claim, yet the defendant herein, Standard Accident Insurance Company and said Joseph A. Tintari have and continue to fail and omit to pay said amount of $408.14 unto use-plaintiff herein all to the damage of use-plaintiff herein in the sum of $408.14, together with interest from November 10, 1933.

Wherefore, Plaintiff United States of America, for the use and benefit of L. R. Powell, Jr. and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a corporation, brings this action and claims damages in the sum of Seven Hundred Fifty Dollars ($750.00).

Knight, Thompson & Turner, Attorneys for Plaintiff.

2—41

EXHIBIT "A" TO DECLARATION

Standard Form No. 25

Approved by the President Nov. 10, 1926

Standard Government Form of Performance Bond

(Construction or Supply)

Know All Men by These Presents, That we, Joseph A. Tintari, of Chicago Heights, Illinois, (See Instructions 4, 5, and 7) as Principal, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, of Detroit, Michigan, (See Instructions 2, 3, 4, and 7), as Surety, are held and firmly bound unto the United States of America, hereinafter called [fol. 6] the Government, in the penal sum of Seventy Thousand Dollars lawful money of the United States, for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation is Such, that whereas the principal entered into a certain contract, hereto attached, with the Government, dated January 25th, 1933, for the construction, including approaches, of the Post Office at Sarasota, Florida, per Bid No. 2 (using a limestone having the characteristics of "Florida Travertine" for all exterior facing where stone is indicated on the drawings):

Now therefore, if the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, and if said contract is for the construction or repair of a public building or a public work within the meaning of the act of August 13, 1894, as amended by act of February 25, 1905, shall promptly make payment to all persons supplying the principal with labor and materials in the prosecution of the work provided for in said contract, and any such authorized extension or modification thereof, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 30th [fol. 7] day of January, 1933, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

[Seal]

JOSEPH A. TINTARI,
(Individual principal)
1502 Scott Ave., Chicago Hgts., Ill.
(Business address)

In presence of—
CELIO RUGGERI,
1144 West End Ave.,
Chgo. Hghts., Ill.
(Address)

..... [Seal]
(Individual principal)
.....
(Business address)

.....
.....
(Address)

..... [Seal]
(Individual surety)
.....
(Business address)

.....
.....
(Address)

..... [Seal]
(Individual surety)
.....
(Business address)

.....
.....
(Address)

[fol. 8]

.....
(Corporate principal
.....
(Business address)
By .....
[Affix corporate Seal]
.....

Attest:

.....

STANDARD ACCIDENT INSURANCE COMPANY,
(Corporate surety)
640 Temple Ave.,
Detroit, Mich.
(Business Address)
[Affix corporate Seal]
By M. J. SCHEEMEACKER,
Agent and Attorney
in Fact.

Witness:
A. H. ANDERSON.

The rate of premium on this bond is $15.00 per thousand.

Total amount of premium charged, $2,040.00.

(The above must be filled in by corporate surety.)

Certificate as to Corporate Principal

I, ..., certify that I am the ..... secretary of the corporation named as principal in the within bond; that ..... who signed the said bond on behalf of the principal was then ..... of said corporation; that I know his signature, and his signature thereto is genuine; and that said bond was duly signed, sealed, and attested for [fol. 9] and in behalf of said corporation by authority of its governing body.

.....
[Corporate Seal.]

Affidavit by Individual Surety

STATE OF .....,
County of ....., ss:

I, ..., being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at .....

and that I am worth in real estate and personal property the sum of ..... dollars, over and above (1) all my debts and liabilities, owing and incurred, (2) any property exempt from execution, (3) and aggregate full penalties on all other bonds on which I am surety, and (4) any pecunary interest I have in the business of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth ..... dollars, located in ..... ; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process, and that I am not surety on any other bonds, except as follows:

.....

(State character and amount of each bond. If not on other bonds, so state.)

.....

.....

.....

(Surety's signature)

Subscribed and sworn to before me this ..... day of ....., 19..., at .....

.....

.....

[Official Seal] (Title of official administering oath)

[fol. 10] Affidavit by Individual Surety

STATE OF .....
County of ....., ss:

I, ..., being duly sworn, depose and say that I am one of the sureties to the foregoing bond; that I am a citizen of the United States, and of full age and legally competent; that I reside at ..... and that I am worth in real estate and personal property the sum of ..... dollars, over and above (1) all my debts and liabilities, owing and incurred, (2) any property exempt from execution, (3) the aggregate full penalties on all other bonds on which I am surety, and (4) any pecuniary interest I have in the busi-

ness of the principal on said bond; that I own, unincumbered, real estate, the fee of which is in my name, worth .....dollars, located in .....; that said property is not exempt from seizure and sale under any homestead law, community, or marriage law, or upon any attachment, execution, or judicial process, and that I am not surety on any other bonds, except as follows:

.....

(State character and amount of each bond. If not on other bonds, so state.)

.....

.....

.....

(Surety's signature)

Subscribed and sworn to before me this .....day of ....., 19..., at .....

.....

[Official Seal] (Title of official administering oath)

[fol. 11] Certificate of Sufficiency

I, ..., do hereby certify that ..... one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

.....

.....

(Address)

Certificate of Sufficiency

I, ..., do hereby certify that ..... one of the sureties named above, is personally known to me, and that, to the best of my knowledge and belief, the facts stated by such surety in the foregoing affidavit are true.

.....

.....

(Address)

Instructions

1. This form shall be used for construction work or the furnishing of supplies, whenever a bond is required.

2. The surety on the bond for any bid or for the performance of the contract may be any corporation authorized by the Secretary of the Treasury to act as surety, or two responsible individual sureties. Individual sureties shall justify in sums aggregating not less than double the penalty of the bond.

[fol. 12] 3. A firm, as such, will not be accepted as a surety, nor a partner for copartners or for a firm of which he is a member. Stockholders of a corporate principal may be accepted as sureties provided their qualifications as such are independent of their stock holdings therein. Sureties, if individuals, shall be citizens of the United States; except that sureties on bonds executed in any foreign country, the Canal Zone, the Philippine Islands, Porto Rico, Hawaii, Alaska, or any possession of the United States, for the performance of contracts entered into in these places, need not be citizens of the United States, but if not citizens of the United States shall be domiciled in the place where the contract is to be performed.

4. The name, including full Christian name, and residence of each individual party to the bond shall be inserted in the body thereof, and each such party shall sign the bond with his usual signature on the line opposite the scroll seal, and if signed in Maine, Massachusetts, or New Hampshire, an adhesive seal shall be fixed opposite the signature.

5. If the principals are partners, their individual names shall appear in the body of the bond, with the recital that they are partners composing a firm, naming it, and all the members of the firm shall execute the bond as individuals.

6. The signature of a witness shall appear in the appropriate place, attesting the signature of each individual party to the bond.

7. If the principal or surety is a corporation, the name of the State in which incorporated shall be inserted in the appropriate place in the body of the bond, and said instru-

[fol. 13] ment shall be executed and attested under the corporate seal as indicated in the form. If the corporation has no corporate seal the fact shall be stated, in which case a scroll or adhesive seal shall appear following the corporate name.

8. The official character and authority of the person or persons executing the bond for the principal, if a corporation, shall be certified by the secretary or assistant secretary, according to the form attached thereto. In lieu of such certificate there may be attached to the bond copies of so much of the records of the corporation as will show the official character and authority of the officer signing, duly certified by the secretary or assistant secretary, under the corporate seal, to be true copies.

9. Each individual surety shall justify, under oath, according to the form appearing on the bond, before a United States commissioner, a clerk of a United States Court, a notary public, or some other officer having authority to administer oaths generally. If the officer has an official seal it shall be affixed, otherwise the proper certificate as to his official character shall be furnished. Where citizenship is not required, as provided in paragraph 3 of these Instructions, the affidavit may be amended accordingly.

10. The certificate of sufficiency shall be signed by a Judge or Clerk of a Court of record, a United States district attorney or commissioner, or the president or cashier of a bank or trust company.

11. The date of the bond must not be prior to the date of the instrument for which it is given.

[fol. 14] Form 8651

Treasury Department

Office of the Supervising Architect

Contract of Joseph A. Tintari, 1502 Scott Avenue

Of Chicago Heights, Illinois.

For Construction.
For U. S. Post Office.
At Sarasota, Florida.
Dated January 25, 1933. I sent 1-25—in site OK.
Amount, $136,000.00.

Copy assignment: CG O CEXX Con Sur Archts.
√ Entered.
√ Drawings sent.

√ Charged Surety Section.
√ Charged Solicitor.
√ Drawings signed.

2-14-33—PEM.

Telegrams sent.
Divisions notified.

Duplicated.
Acknowledgments.
Envelopes.
Charged out.
Solvency record.

Return to Supervising Architect.

Treasury Department

Office of the Supervising Architect

Feb. 2, 1933.

Respectfully referred to the Solicitor of the Treasury, through the office of Commissioner of Accounts and [fol. 15] Deposits, Section of Surety Bonds, for examination and indorsement.

H. G. Sherwood, Executive Officer.

CWH.

Department of Justice

Office of the Solicitor of the Treasury

Feb. 8, 1933.

I have examined the within instruments as to form and execution, and in these respects they are approved.

T. Sack, Assistant Solicitor of the Treasury.

FM.

Received, Office Supervising Architect, Treasury Dept., Feb. 1, 1933. Noted..... Ans'd..... 19....

Treasury Department

Office of the Secretary

Commissioner of Accounts and Deposits

Section of Surety Bonds

Feb. 3, 1933

Examined and approved as to the within corporate surety.

Respectfully referred to the Solicitor of the Treasury for examination as to form and legal sufficiency.

D. W. Bell, Commissioner of Accounts and Deposits.

efi.

Solicitor of the Treasury, Received Feb. 3, 1933.

EXHIBIT "B" TO DECLARATION

(Copies of Freight Bills)

Received from
L. R. Powell, Jr. and E. W. Smith, Receivers
Seaboard Air Line Railway
In Good Condition the Articles Described Below

712—SEABOARD AIR LINE RAILWAY—712

L. R. Powell, Jr., and E. W. Smith, Receivers

Form 2297

DELIVERY RECEIPT

STOP THIS CAR AT | FOR | Weight in Tons: Gross | Net

Freight Bill No. 4091
Freight Bill Date 9/26/33

CAR INITIALS AND NUMBER | C. L. Transferred to or L. C. L. Loading No. | DATE | WAYBILL No.

SAL 99679 | 9/22/33 | L 3544

TO STATION STATE | FROM STATION STATE

Sarasota, Fla. | Conrock Brooksville, Fla.

ROUTE (Show each Junction and Carrier in Route Order to Destination of Waybill—Indicate by Check Mark whether Shipper's Routing or Agent's Routing) | Shipper's Routing | Agent's Routing

SAL

CONSIGNEE, ADDRESS (Final Destination and Additional Routing)

Joseph A Tintari

FULL NAME OF SHIPPER (Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference and Routing When Rebilled.)

Florida Crushed Stone Co.

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

Length of Car Ordered	Length of Car Furnished	Marked Capacity of Car Ordered	Marked Capacity of Car Furnished	Stenciled Weight of Car

WEIGHED
AT
GROSS
TARE
ALLOWANCE
NET

This Waybill shall be used for All Single Consignments, whether Carload or Less Carload or Interline

(1st) Transfer or Authority for Diversion | (2nd) Transfer or Authority for Diversion | (3rd) Transfer or Authority for Diversion | (4th) Transfer or Authority for Diversion

Indicate by symbol in column provided how weights were obtained for L. C. L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	*	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
C/L Crushed Stone	117300		1.10 IR		64.52 3.52 68.04 Collect		

COPY

DEPOSITED IN MAIL BOX DATE	ARRIVAL NOTICE SENT BY U. S. MAIL ADDRESS	SIGNATURE DATE OF DELIVERY 193 TIME	CONSIGNEE

712—SEABOARD AIR LINE RAILWAY—712

16

13

Received from
L. R. Powell, Jr., and E. W. Smith, Receivers
Seaboard Air Line Railway
In Good Condition the Articles Described Below

712—SEABOARD AIR LINE RAILWAY—712

L. R. Powell, Jr., and E. W. Smith, Receivers

DELIVERY RECEIPT

Form 2377

STOP THIS CAR AT | FOR | Weight in Tons: Gross | Net

Freight Bill No. 4092
Freight Bill Date 9/25/33

CAR INITIALS AND NUMBER: SAL 99186

C. L. Transferred to or L.C.L. Loading No.

DATE: 9/22/33

WAYBILL No.: L 3348

TO STATION STATE: Sarasota, Fla.

FROM STATION STATE: Conrock
NO. ( ) Brooksville, Fla.

ROUTE (Show each Junction and Carrier in Route Order to Destination of Waybill. Indicate by Check Mark whether Shipper's or Agent's Routing.): SAL

Shipper's Routing

Agent's Routing

FULL NAME OF SHIPPER (Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference and Routing When Rebilled.): Florida Crushed Stone Co.

CONSIGNEE, ADDRESS (Final Destination and Additional Routing): Joseph A Tintari

Length of Car Ordered	Length of Car Furnished	Marked Capacity of Car Ordered	Marked Capacity of Car Furnished	Stenciled Weight of Car

WEIGHED
AT
GROSS
TARE
ALLOWANCE
NET

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

This Waybill shall be used for All Single Consignments, whether Carload or Less Carload or whether Local or Interline

(1st) Transfer or Authority for Diversion

(2nd) Transfer or Authority for Diversion

(3rd) Transfer or Authority for Diversion

(4th) Transfer or Authority for Diversion

Indicate by symbol in column provided ★ how weights were obtained for L. C. L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	★	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
C/L Crushed Stone			121600	110	66.88		
				IR	3.65		
					70.53		Collect

COPY

DEPOSITED IN MAIL BOX	ARRIVAL NOTICE SENT BY U. S. MAIL
DATE	ADDRESS
TIME	
BY WHOM	

SIGNATURE
DATE OF DELIVERY 193
TIME
CONSIGNEE

17

712—SEABOARD AIR LINE RAILWAY—712

17

Received from L. R. Powell, Jr. and E. W. Smith, Receivers Seaboard Air Line Railway In Good Condition the Articles Described Below

712—SEABOARD AIR LINE RAILWAY—712

L. R. Powell, Jr., and E. W. Smith, Receivers

Form 2377

DELIVERY RECEIPT

STOP THIS CAR AT | FOR | Weight in Tons: Gross | Net

Freight Bill No. 4095
Freight Bill Date 9/26/33

CAR INITIALS AND NUMBER: SAL 13126

C. L. Transferred to or L.C.L. Loading No.

DATE: 9/25/33

WAYBILL No.: 15404

TO | STATION | STATE: Sarasota, Florida

FROM | STATION | STATE: [redacted] Tampa, Fla.

NO. ( ) [redacted]

ROUTE (Show each Junction and Carrier in Route Order to Destination of Waybill. Indicate by Check Mark whether Shipper's or Agent's Routing.): SAL

Shipper's Routing

Agent's Routing

FULL NAME OF SHIPPER (Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference and Routing When Rebilled.): Florida Portland Cement

CONSIGNEE, ADDRESS (Final Destination and Additional Routing): Joseph A Tintari

Length of Car Ordered	Length of Car Furnished	Marked Capacity of Car Ordered	Marked Capacity of Car Furnished	Stenciled Weight of Car

WEIGHED

AT

GROSS

TARE

ALLOWANCE

NET

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

(1st) Transfer or Authority for Diversion

(2nd) Transfer or Authority for Diversion

(3rd) Transfer or Authority for Diversion

(4th) Transfer or Authority for Diversion

This Waybill shall be used for All Single Consignments, whether Carload or Less Carload or whether Local or Interline

Indicate by symbol in column provided how weights were obtained for L. C. L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	*	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
528 Sx Cement			50160	115	57.68		
				IR	5.02		
					62.70	Collect	

COPY

DEPOSITED IN MAIL BOX	ARRIVAL NOTICE SENT BY U. S. MAIL
DATE	ADDRESS
TIME	
BY WHOM	

SIGNATURE

DATE OF DELIVERY 193

CONSIGNEE

TIME

18

712—SEABOARD AIR LINE RAILWAY—712

15

Received from
L. R. Powell, Jr., and E. W. Smith, Receivers
Seaboard Air Line Railway
In Good Condition the Articles Described Below

712—SEABOARD AIR LINE RAILWAY—712

L. R. Powell, Jr., and E. W. Smith, Receivers

Form 2977

DELIVERY RECEIPT

STOP THIS CAR AT — FOR

Weight in Tons: Gross — Net

Freight Bill No. 4582
Freight Bill Date 10/19/33

CAR INITIALS AND NUMBER — C. L. Transferred to or L.C.L. Loading No. — DATE — WAYBILL No.

TO LAN 25136 STATION — STATE

10/15/33 STATION 5297 STATE

Sarasota, Fla.

TSX
NO. ( ) Anniston, Ala.

ROUTE (Show each Junction and Carrier in Route Order to Destination of Waybill. Indicate by Check Mark whether Shipper's or Agent's Routing.) — Shipper's Routing — Agent's Routing

FULL NAME OF SHIPPER (Origin and Date, Original Car, Transfer Freight Bill or Previous Waybill Reference and Routing When Rebilled.)

Kilby Car & Fdy Co.

CONSIGNEE, ADDRESS (Final Destination and Additional Routing)

Josephine Tintari

Length of Car Ordered	Length of Car Furnished	Marked Capacity of Car Ordered	Marked Capacity of Car Furnished	Stenciled Weight of Car

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

WEIGHED
AT
GROSS
TARE
ALLOWANCE
NET

This Waybill shall be used for All Single Consignments, whether Carload or Less Carload or Interline

(1st) Transfer or Authority for Diversion	(2nd) Transfer or Authority for Diversion	(3rd) Transfer or Authority for Diversion	(4th) Transfer or Authority for Diversion

Indicate by symbol in column provided how weights were obtained for L. C. L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	*	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
1 Car Steel Bars SLAC			43400	58	251.72	Collect	

COPY

DEPOSITED IN MAIL BOX
DATE
TIME
BY WHOM

ARRIVAL NOTICE SENT BY U. S. MAIL
ADDRESS

SIGNATURE
CONSIGNEE
DATE OF DELIVERY 193
TIME

712—SEABOARD AIR LINE RAILWAY—712 19

16

Received from
L. R. Powell, Jr., and F. W. Smith, Receivers
Seaboard Air Line Railway
In Good Condition the Articles Described Below:

712—SEABOARD AIR LINE RAILWAY—712

L. R. Powell, Jr., and F. W. Smith, Receivers

Form 2377

DELIVERY RECEIPT

STOP THIS CAR AT | FOR | Weight in Tons: Gross | Net

Freight Bill No. 4563
Freight Bill Date 10/21/33

CAR INITIALS AND NUMBER: **SAL 99454**

C. L. Transferred to or L.C.L. Loading No.

DATE: **10/19/33**

WAYBILL No.: **L 3570**

TO STATION STATE: **Sarasota, Fla.**

VIA STATION STATE: **Conrock Brooksville, Fla.**

ROUTE (Show each Junction and Carrier in Route Order to Destination of Waybill. Indicate by Check Mark whether Shipper's or Agent's Routing.)

Shipper's Routing

Agent's Routing

SAL

FULL NAME OF SHIPPER (Origin and Date, Original Car, Transfer Freight Bill or Previous Waybill Reference and Routing When Rebilled.)

Florida Crushed Stone Co

CONSIGNEE, ADDRESS (Final Destination and Additional Routing)

Joseph A Tintari

Length of Car Ordered	Length of Car Furnished	Marked Capacity of Car *Ordered	Marked Capacity of Car Furnished	Stenciled Weight of Car

WT. CHT.

AT
GROSS
TARE
ALLOWANCE
NET

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

This Waybill shall be used for All Single Consignments, whether Carload or Less Carload or Interline

(1st) Transfer or Authority for Diversion	(2nd) Transfer or Authority for Diversion	(3rd) Transfer or Authority for Diversion	(4th) Transfer or Authority for Diversion

Indicate by symbol in column provided how weights were obtained for L. C. L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct

DESCRIPTION OF ARTICLES AND MARKS	Commodity, No.	*	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
Crushed Stone			**114500**	**110**	**62.97 Collect**		

COPY

DEPOSITED IN MAIL BOX	ARRIVAL NOTICE SENT BY U. S. MAIL
DATE	ADDRESS
TIME	
BY WHOM	

SIGNATURE
DATE OF DELIVERY 193 CONSIGNEE
TIME 20

712—SEABOARD AIR LINE RAILWAY—712

17

Received from
L. R. Powell Jr. and E. W. Smith, Receivers
Seaboard Air Line Railway
In Good Order, Except as Noted Below:

712—SEABOARD AIR LINE RAILWAY—712

L. R. Powell, Jr., and E. W. Smith, Receivers

Form 2277

DELIVERY RECEIPT

STOP THIS CAR AT ____ FOR

Weight to Date — Gross ____ Net ____

Freight Bill No. 4564
Freight Bill Date 10/21/33

CAR INITIALS AND NUMBER: SAL 96104

C. L. Transferred to or L. C. L. Loading No.: -

DATE: 10/19/33

WAYBILL No.: L 3569

TO STATION: Sarasota, Florida

STATE:

FROM STATION: Conrock

STATE:

NO. ( ) Brooksville, Fla.

ROUTE (Show each Junction and Carrier in Route Order to Destination of Waybill. Indicate by Check Mark whether Shipper's or Agent's Routing.)

Shipper's Routing

Agent's Routing

FULL NAME OF SHIPPER (Origin and Date, Original Car, Transfer Freight Bill and Previous Waybill Reference and Routing When Rebilled.)

Florida Crushed Stone Co.

CONSIGNEE, ADDRESS (Final Destination and Additional Routing)

Joseph A Tintari

Length of Car Ordered	Length of Car Furnished	*Marked Capacity of Car Ordered	*Marked Capacity of Car Furnished	Stenciled Weight of Car

WEIGHED

AT ____

GROSS ____

TARE ____

ALLOWANCE ____

NET ____

INSTRUCTIONS (Regarding Icing, Ventilation, Heating, Milling, Weighing, Etc. If Iced, Specify to Whom Icing Should be Charged.)

This Waybill shall be used for All Single Consignments, whether Carload or Less Carload or Other Local or Interline

(1st) Transfer or Authority for Diversion

(2nd) Transfer or Authority for Diversion

(3rd) Transfer or Authority for Diversion

(4th) Transfer or Authority for Diversion

Indicate by symbol in column provided how weights were obtained for L. C. L. Shipments only. R—Railroad Warehouse Scale. S—Shipper's Agreement or Tested Weights. E—Estimated—Weigh and Correct.

DESCRIPTION OF ARTICLES AND MARKS	Commodity No.	*	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
Crushed Stone			113200	1.10	62.26	Collect	

COPY

DEPOSITED IN MAIL BOX	ARRIVAL NOTICE SENT BY U. S. MAIL
DATE	ADDRESS
TIME	
BY WHOM	

SIGNATURE

DATE OF DELIVERY ____ 193 CONSIGNEE

TIME

21

712—SEABOARD AIR LINE RAILWAY—712

18

4 - - - -32

DELIVERY RECEIPT

RECEIVED FROM SEABOARD AIR LINE RAILWAY, IN GOOD CONDITION THE ARTICLES DESCRIBED BELOW

(MAKE CHECK PAYABLE TO L. R. Powell, Jr. and E.W. Smith, Receivers, SEABOARD AIR LINE RAILWAY)

CONSIGNEE Joseph A Tintari

FREIGHT BILL NO. 5242

ROUTE SAL (POINT OF ORIGIN TO DESTINATION)

FREIGHT BILL DATE Nov 7 1933 193

WAYBILLED FROM	WAYBILL DATE AND NUMBER	FULL NAME OF SHIPPER	CAR INITIAL AND NUMBER
Conrock Fla' B/A Brooksville Fla	3882 Nov 6 1933 Fla Crushed Stone Co		

POINT AND DATE OF SHIPMENT — CONNECTING LINE REFERENCE — PREVIOUS WAYBILL REFERENCE — ORIGINAL CAR INITIAL AND NUMBER

WEIGHED AT — GROSS — TARE SAL 96491 — NET

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Crushed stone SL&C	11300	110	62.15	Collect.	

Thank You. Your Business is Appreciated

ARRIVAL NOTICE SENT BY U. S. MAIL

ADDRESS

SIGNATURE CONSIGNEE

DATE OF DELIVERY 193

TIME

DELIVERY RECEIPT

FORM 7-A

RECEIVED FROM SEABOARD AIR LINE RAILWAY, IN GOOD CONDITION THE ARTICLES DESCRIBED BELOW:

(MAKE CHECK PAYABLE TO L. R. Powell, Jr. and E. W. Smith, Receivers, SEABOARD AIR LINE RAILWAY)

CONSIGNEE Joseph A Tintari

FREIGHT BILL NO. 5243

ROUTE SAL (POINT OF ORIGIN TO DESTINATION)

FREIGHT BILL DATE Nov 7 1933 193

WAYBILLED FROM	WAYBILL DATE AND NUMBER	FULL NAME OF SHIPPER	CAR INITIAL AND NUMBER
Conrock Fla B.A	Brooksville Fla	L 3881 Nov 6 1933 Fla	Crushed stone.

POINT AND DATE OF SHIPMENT — CONNECTING LINE REFERENCE — PREVIOUS WAYBILL REFERENCE — ORIGINAL CAR INITIAL AND NUMBER

WEIGHED AT — GROSS — TARE SAL 98858 — NET

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Car Crushed stone SL&C	109600	110	60.28	Collect.	

Thank You. Your Business is Appreciated

ARRIVAL NOTICE SENT BY U. S. MAIL

ADDRESS

SIGNATURE CONSIGNEE

DATE OF DELIVERY 193

TIME

22

19

DELIVERY RECEIPT

FORM 7-A

RECEIVED FROM SEABOARD AIR LINE RAILWAY IN GOOD CONDITION THE ARTICLES DESCRIBED BELOW:

(MAKE CHECK PAYABLE TO L. R. Powell, Jr. and E. W. Smith, Receivers, SEABOARD AIR LINE RAILWAY)

CONSIGNEE Joseph A Tintari

FREIGHT BILL NO. 5244

ROUTE SAL (POINT OF ORIGIN TO DESTINATION)

FREIGHT BILL DATE Nov 7 1925 192

WAYBILLED FROM	WAYBILL DATE AND NUMBER	FULL NAME OF SHIPPER	CAR INITIAL AND NUMBER
Conrock Fla B/A Brooksville Fla	L 2880 Nov 6 1925	Fla Crushed Stone Co	SAL 97210

POINT AND DATE OF SHIPMENT | CONNECTING LINE REFERENCE | PREVIOUS WAYBILL REFERENCE | ORIGINAL CAR INITIAL AND NUMBER

WEIGHED AT | GROSS | TARE | NET

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
Car Crushed Stone SAL Thank You - Your Business is Appreciated	118400	110	62.37	Collect.	

ARRIVAL NOTICE SENT BY U. S. MAIL

ADDRESS

SIGNATURE CONSIGNEE

DATE OF DELIVERY 192

TIME

425M-11 32

DELIVERY RECEIPT

FORM 7-A

RECEIVED FROM SEABOARD AIR LINE RAILWAY, IN GOOD CONDITION THE ARTICLES DESCRIBED BELOW:

(MAKE CHECK PAYABLE TO L. R. Powell, Jr. and E. W. Smith, Receivers, SEABOARD AIR LINE RAILWAY)

CONSIGNEE Joseph A. Tintari

FREIGHT BILL NO. 5534

ROUTE SAL (POINT OF ORIGIN TO DESTINATION)

FREIGHT BILL DATE Nov 10 1925 192

WAYBILLED FROM	WAYBILL DATE AND NUMBER	FULL NAME OF SHIPPER	CAR INITIAL AND NUMBER
Zemo Fla 18190	Nov 9 1925	Fla Portland Cement co	SAL 12400

POINT AND DATE OF SHIPMENT | CONNECTING LINE REFERENCE | PREVIOUS WAYBILL REFERENCE | ORIGINAL CAR INITIAL AND NUMBER

WEIGHED AT | GROSS | TARE | NET

NUMBER OF PACKAGES, ARTICLES AND MARKS	WEIGHT	RATE	FREIGHT	ADVANCES	TOTAL
800 SX Cement Thank You - Your Business is Appreciated	76000	115	87.40	Collect.	

ARRIVAL NOTICE SENT BY U. S. MAIL

ADDRESS

SIGNATURE CONSIGNEE

DATE OF DELIVERY 192

TIME

23

20

[fol. 24] IN UNITED STATES DISTRICT COURT

DEMURRER—Filed March 20, 1936

Now comes Standard Accident Insurance Company, defendant herein, by its undersigned counsel and demurs to the Declaration heretofore filed herein and as grounds for such demurrer, says:

1. That said Declaration does not state a cause of action.

2. That the Declaration shows on its face that the sums claimed therein were not for labor and material furnished Joseph A. Tintari in the prosecution of the work.

3. That the items claimed are not within the language of the bond sued upon.

4. That freight is not within the meaning of the words "labor and materials," as set forth in the Act of Congress and in the terms of the bond.

Wylie & Warren, by Stuart B. Warren, Attorneys for Defendant.

STATE OF FLORIDA,
County of Pinellas, ss:

On the 19th day of March, A. D. 1936, before me the undersigned authority, personally appeared Stuart B. Warren, of counsel for the above named defendant in the foregoing cause, who, being first duly sworn, says that the [fol. 25] foregoing Demurrer is not interposed for delay but in good faith.

Stuart B. Warren.

Sworn to and subscribed before me this 19th day of March, A. D. 1936. Mary E. Garland, Notary Public. Notary Public, State of Florida at Large. My Commission expires Nov. 3, 1937. (Notarial Seal affixed.)

I, Stuart B. Warren, of counsel for the above named defendant, do hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

Stuart B. Warren.

IN UNITED STATES DISTRICT COURT

JUDGMENT—January 8, 1937

This cause coming on to be heard upon the demurrer of defendant, Standard Accident Insurance Company, a corporation, to the declaration of the plaintiff, United States of America, for the use and benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a corporation, and same having been argued by counsel, it is

Ordered, Adjudged and Decreed that said demurrer be and the same is hereby overruled.

Counsel for defendant having declared in open Court that defendant does not desire to plead further in this cause, and although denying legal liability therefore, defendant's [fol. 26] attorney stipulated in open Court that the claim of the plaintiff as set forth in the declaration is the true and correct amount of charges for freight against Joseph A. Tintari, and counsel for said defendant having in open Court dispensed with further proof of said claim, it is thereupon, upon consideration thereof,

Ordered, Adjudged and Decreed that the plaintiff, United States of America, for the use and benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a corporation, do have and obtain its judgment against the defendant, Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, of Detroit, Michigan, and do have and recover of and from said defendant the sum of $408.14, as principal, and the further sum of $103.19, as interest, together with its costs incurred in this action, which are here and now taxed in the sum of $17.94, for which let execution issue.

Done and Ordered this 8th day of January, 1937.

Alexander Akerman, Judge of the aforesaid Court.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed January 8, 1937

Now comes Standard Accident Insurance Company, a corporation organized and existing under the laws of the

State of Michigan, of Detroit, Michigan, the defendant in the Trial Court and plaintiff in error, and for its complete [fol. 27] assignments of errors upon which it relies for a reversal of this cause in the Circuit Court of Appeals, in this connection says that in the record proceedings and final judgment aforesaid, manifest error hath happened and intervened to the prejudice of this defendant and plaintiff in error, to-wit:

1. The Court erred in overruling the defendant's Demurrer to the Declaration.

2. The Court erred in entering up Final Judgment against the defendant.

Wherefore, Standard Accident Insurance Company, defendant in said cause, prays that the Judgment may be reversed.

George W. Wylie, Stuart B. Warren, Attorneys for Standard Accident Insurance Company.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed January 8, 1937

To the Honorable Alexander Akerman, Judge Presiding in said Court:

Comes now the defendant in the above styled cause, Standard Accident Insurance Company, a Corporation organized and existing under the laws of the State of Michigan, of Detroit, Michigan, by its undersigned attorneys, and feeling itself aggrieved by the Final Judgment of this Honorable Court entered against it in favor of the said United States of America, for the use and benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a corporation, [fol. 28] on the 8th day of January, A. D. 1937, hereby prays that an Appeal may be allowed from the United States Circuit Court of Appeals for the Fifth Circuit, to the District Court of the United States for the Southern District of Florida, and be made returnable according to law and the practice of this Court. And the said petitioner

respectfully presents herewith its Assignment of Errors and prayer for reversal.

George W. Wylie, Stuart B. Warren, Attorneys for Standard Accident Insurance Company.

IN UNITED STATES DISTRICT COURT

PRAYER FOR REVERSAL—Filed January 8, 1937

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit:

Comes now the Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, of Detroit, Michigan, plaintiff in error, defendant from the Court below and prays for a reversal of the judgment of the District Court of the United States for the Southern District of Florida, in a certain matter therein pending, being a common law action for damages in which United States of America, for the use and benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, a corporation, is plaintiff, and Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, of Detroit, Michigan, is de-
[fol. 29] fendant, which judgment was entered on the 8th day of January, A. D. 1937, in said District Court.

George W. Wylie, Stuart B. Warren, Attorneys for Standard Accident Insurance Company.

The foregoing Prayer for Reversal was presented and filed before me this the 8th day of January, A. D. 1937.

Alexander Akerman, United States District Judge.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—January 8, 1937

This 8th day of January, A. D. 1937, came the defendant, Standard Accident Insurance Company, a corporation organized and existing under the laws of the State of Michigan, of Detroit, Michigan, and filed herein and presented

to the Court its petition, praying for the allowance of Appeal and Assignments of Error to be urged by it, praying also that a transcript of the record and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Judicial Circuit and that such other and further proceedings may be had as may be proper in the premises.

In consideration whereof, the Court does allow the Appeal upon the defendant's giving bond according to law in the sum of One Thousand ($1,000.00) Dollars, which shall operate as a supersedeas bond.

Alexander Akerman, United States District Judge.

[fol. 30] Supersedeas bond on appeal, approved and filed January 8, 1937, omitted in printing.

[fol. 31] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed January 8, 1937

To the Clerk of the above entitled Court:

You will please prepare transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, under the appeal heretofore allowed by said Court and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

Declaration.
Demurrer of Defendant.
Final Judgment.
[fol. 32] Assignments of Error.
Petition for Appeal.
Prayer for Reversal.
Order Allowing Appeal.
Citation and Proof of Service.
Supersedeas Bond.
Præcipe for Transcript.
Clerk's Certificate to Transcript.

Said transcript to be prepared as required by law and the rules of the United States Circuit Court of Appeals for the Fifth Judicial Circuit.

George W. Wylie, Stuart B. Warren, Attorneys for the Defendant.

We, the undersigned attorneys for the plaintiff, agree that the records, documents, papers and proceedings set forth in the foregoing Præcipe for Transcript are sufficient for a complete record in this cause on appeal, and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript.

We hereby accept service of copy of foregoing Præcipe for Transcript and agree that said Præcipe shall be obeyed by and acted upon by the Clerk without further delay.

A. G. Turner, Attorneys for Plaintiff.

[fol. 33] Clerk's certificate to foregoing transcript omitted in printing.

(Original Citation omitted from the record, the original thereof being on file in the office of the Clerk of the United States Circuit Court of Appeals.)

* * * * * * *

[fol. 34] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 15th, 1937

No. 8327

STANDARD ACCIDENT INSURANCE COMPANY

versus

UNITED STATES OF AMERICA for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company

On this day this cause was called, and, after argument by Stuart B. Warren, Esq., for appellant, and Jno. Bell, Esq., for appellees, was submitted to the Court.

[fol. 35] OPINION OF THE COURT—Filed April 14, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8327

STANDARD ACCIDENT INSURANCE COMPANY, Appellant,

versus

UNITED STATES OF AMERICA for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Airline Railway Company, Appellees

Appeal from the District Court of the United States for the Southern District of Florida

(April 14, 1937)

Before Foster, Hutcheson and Holmes, Circuit Judges.

HUTCHESON, Circuit Judge:

Appellant is surety on a postoffice construction bond given pursuant to Sec. 270, Title 40 U. S. C. A.[1] Appellee

---

Note 1. Repealed by Act of August 24, 1935, 49 Stat. 794 but with a saving clause as to existing contracts and bonds.

[fol. 36] is a carrier, which having transported materials used in the work, sued upon the bond for its unpaid freight bills. Appellant's demurrer, that a railroad company as to freight charges, is not, within the meaning of the bond, "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work" was overruled, and the facts being admitted, judgment went for plaintiff.

Appellant insists that except for our decision in City of Stuart vs. American Surety Co., 38 Fed. (2d) 193, both reason and authority support its claim that the carrier furnished neither labor nor materials to the work. It urges us to reexamine that case, and either disapprove its holding or confine its effect to a bond worded literally and precisely as that one was. It urges upon us, in short, a return to our earlier decision, United States vs. Hyatt, 92 Fed. 442, which the Stuart case, though not expressly, has impliedly overruled.

In support of this urging it invokes dictionary definitions, and relies upon what it assumes to be the intent and reason of the law. Its argument brings forward all the reasons advanced, in the cases it relies on, for a strict construction of the bond, and a denial to common carriers of its protection. These reasons, particularly the existence of the carrier's lien and the indirectness of its claim of furnishing, were all examined and rejected in the City of Stuart case, and the cases cited in it, and in later decided cases affirming and approving it.

It will serve no purpose for us to thresh again this old straw. It is sufficient for us to say that we disapprove the ruling and teaching of the Hyatt case. We approve that in City of Stuart.

In addition to the cases it cites, attention may be called to the following cases, either citing it with approval or announcing adherence to the same principle, a broad and [fol. 37] liberal construction of the statute and bond. United States vs. Hercules Co., 53 Fed. (2d) 451; United States vs. James Baird Co., 73 Fed. (2d) 652; Equitable Casualty Co. vs. Helena Grocery Co., 60 Fed. (2d) 380; Holloway & Dupont Dredging Co. vs. Des-Rocher, 57 Fed. (2d) 864; American Surety Co. of New York vs. United States, 76 Fed. (2d) 67; Republic Nat. Bank & Trust Co. vs. Massachusetts Bonding & Ins. Co., 68 Fed. (2d), 445; Levy vs. United States Fidelity & Guaranty Co. 68 Fed.

(2d) 329; Massachusetts Bonding Co. vs. United States, for the use of Clarksdale, — Fed. (2d) —.

Affirmed.

[fol. 38] JUDGMENT

Extract from the Minutes of April 14th, 1937

No. 8327

STANDARD ACCIDENT INSURANCE COMPANY

versus

UNITED STATES OF AMERICA for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Standard Accident Insurance Company, and the surety on the appeal bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 39] MOTION AND ORDER STAYING MANDATE—Filed April 27th, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8327

STANDARD ACCIDENT INSURANCE COMPANY, Appellant,

versus

UNITED STATES OF AMERICA, for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, Appellees

Motion for Stay of Mandate

Comes now the Standard Accident Insurance Company, Appellant in the above entitled cause, and respectfully moves

this Honorable Court to stay the mandate in the above entitled cause and not permit the same to be issued out of said action until the further order of the Court, on the ground and for the reason that the Appellant expects and intends, in good faith, within the time allowed by law, to apply to the Supreme Court of the United States, by petition for review on writ of certiorari, the decision and judgment rendered in favor of Appellee and against Appellant in the above entitled action.

Appellant further shows unto the Court that there has already been filed in the cause a supersedeas bond in the Court below and that it is ready, able and willing to make any further good and sufficient bond, conditioned as provided by law that this Court may require.

Wherefore, Appellant moves the Court that it make and [fol. 40] enter a proper order herein staying the issuance of the mandate in the above entitled cause until the further order of the Court.

(Signed) Geo. W. Wylie, Stuart B. Warren, Attorneys for Appellant.

STATE OF FLORIDA,
County of Hillsborough, ss:

We, Knight, Thompson & Turner, Attorneys for Appellee in the above entitled cause, hereby acknowledge receipt of copy of the above Motion and enter our consent to the entry of an Order, as prayed for in said Motion.

Knight, Thompson & Turner, by (Signed) Jno. R. Bell, Attorneys for Appellee.

[fol. 41] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8327

STANDARD ACCIDENT INSURANCE COMPANY, Appellant,

versus

UNITED STATES OF AMERICA for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, Appellees

On Consideration of the Application of the appellant in the above numbered and entitled cause for a stay of the

mandate of this court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 27th day of April, 1937.

(Signed) Joseph C. Hutcheson, Jr., United States Circuit Judge.

[fol. 42] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 34 to 41 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8327, wherein Standard Accident Insurance Company is appellant, and United States of America, for the use and benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers of the Seaboard Air Line Railway Company, are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 33 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 27th day of April, A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

Endorsed on cover: File No. 41,498. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 41. Standard Accident Insurance Company, petitioner, vs. The United States of America, for the use and benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers, etc. Petition for a writ of certiorari and exhibit thereto. Filed May 7, 1937. Term No. 41, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 7 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. [redacted] 41

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

GEORGE W. WYLIE,
STUART B. WARREN,
St. Petersburg, Florida,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 958

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Your petitioner, Standard Accident Insurance Company, a corporation, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals #8327, entered on April 14, 1937 (R. 36), affirming a certain judgment of the United States District Court for the Southern District of Florida (Civil 3420-T) (R. 25, 26).

Summary Statement of the Matter Involved.

Your petitioner is the surety on a postoffice construction bond given pursuant to Act of August 13, 1894, 28 Statutes

278 and amendments thereto, Title 40 U. S. C. A., Section 270 (repealed with a saving clause and a similar statute, with applicable language substituted therefor, Act August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A., 40 Section 270a). (See appendix.)

Respondent is a carrier, which, having transported materials used in the work, sued upon the bond for its unpaid freight bills. (Declaration, R. 2, 3, 4, 5, 6, 7.)

Petitioner's demurrer (R. 24) that a railroad company as to freight charges, is not within the meaning of the bond, "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work" was overruled, and the facts being admitted, judgment went for the respondent in the District Court (R. 25, 26).

From that judgment, appeal was taken by the petitioner to the United States Circuit Court of Appeals for the Fifth Circuit (R. 28), which, after hearing, affirmed the judgment of the United States District Court (R. 36) (case not yet reported).

A stay of mandate was entered on the application of appellant (R. 37-38). The only error assigned in the Circuit Court of Appeals in support of petitioner's appeal, questioned the ruling of the lower court in its decision that freight charges were within the meaning of the bond "a corporation which furnished labor or materials used in the construction or repair of any public building or public work".

The United States Circuit Court of Appeals affirmed the judgment of the lower court, adopting the rule of broad and liberal construction of the statute and bond (R. 34-36) (not yet reported).

THE CONTENTION OF YOUR PETITIONER IS THAT THE RULING OF THE U. S. CIRCUIT COURT

OF APPEALS OF THE FIFTH CIRCUIT THAT FREIGHT CHARGES INCURRED BY A CONTRACTOR IN THE PROSECUTION OF A UNITED STATES GOVERNMENT CONTRACT, DO COME WITHIN THE TERMS OF A SURETY BOND CONDITIONED TO "MAKE PAYMENTS TO ALL PERSONS SUPPLYING THE PRINCIPAL WITH LABOR AND MATERIALS IN THE PROSECUTION OF THE WORK", IS IN CONFLICT WITH THE RULING OF THE CIRCUIT COURT OF APPEALS IN THE THIRD AND NINTH CIRCUITS.

Reasons Relied on for Allowance of the Writ.

The decision of the United States Circuit Court for the Fifth Circuit in the instant case and in former cases, is in direct conflict with the decisions of the Circuit Court of Appeals in the Ninth Circuit in the case of *Title Guaranty and Trust Company* v. *Puget Sound Engineer Works,* 163 Fed. Rep. 168, and in direct conflict with a decision of the United States Circuit Court of Appeals of the Third Circuit in the case of *Mandel* v. *United States,* 4 F. (2d) 629, in which said cases a claim for the allowance of freight bills, under an exactly similar bond, was denied.

WHEREFORE your petitioner respectfully prays that this petition for writ of certiorari, to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, be granted.

STANDARD ACCIDENT INSURANCE COMPANY, a Corporation,
By GEORGE W. WYLIE,
Attorney, St. Petersburg, Florida;
GEORGE W. WYLIE,
STUART B. WARREN,
Solicitors, St. Petersburg, Florida.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 958

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES OF AMERICA FOR THE USE AND BENEFITS OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS OF THE SEABOARD AIR LINE RAILWAY COMPANY.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

There was no official written opinion by the District Court Judge. His action in granting the judgment is set forth in the record (R. 25). The opinion of the Circuit Court of Appeals (R. 34-36) is not yet officially reported.

II.

Jurisdiction.

1. The Statutory provision believed to sustain the jurisdiction of this Court is Judicial Code, Section 240a, as

amended by the Act of February 13, 1925, 43 Statutes 938 (U. S. C. Title 28, Sec. 347a).

2. The order of the Circuit Court of Appeals, review of which is sought, was entered on April 14, 1937 (R. 36) (decision not yet reported).

Section 240a of the Judicial Code, as amended, clearly confers jurisdiction upon this Court to bring up a case of this character from the Circuit Court of Appeals by certiorari and sub-paragraph (b) of paragraph 5 of Rule 38 of this Court clearly recognizes such right.

III.

Statement of the Case.

The essential facts of the case are fully stated in the accompanying petition for certiorari and, in the interests of brevity, are not repeated here.

IV.

Specifications of Error.

It is respectfully submitted that the Circuit Court of Appeals erred in affirming the judgment of the District Court.

V.

ARGUMENT.

IT IS OUR CONTENTION THAT THE RULING OF THE UNITED STATES CIRCUIT COURT OF APPEALS OF THE FIFTH CIRCUIT, THAT FREIGHT CHARGES INCURRED BY A CONTRACTOR IN THE PROSECUTION OF A UNITED STATES GOVERNMENT CONTRACT, DO COME WITHIN THE TERMS OF A SURETY BOND CONDITIONED TO "MAKE PAYMENTS TO ALL PERSONS SUPPLYING THE

PRINCIPAL WITH LABOR AND MATERIALS IN THE PROSECUTION OF THE WORK," IS IN CONFLICT WITH THE RULING OF THE CIRCUIT COURTS OF APPEALS IN THE THIRD AND NINTH CIRCUITS.

The Circuit Court of Appeals of the Fifth Circuit, in the instant case, held that a railroad company, as to freight charges, was within the meaning of the bond "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work."

Circuit Judge Hutcheson said in the opinion:

> "Appellee insists that except for our decision in City of Stuart *vs.* American Surety Co. 38 Fed. (2nd) 195, both reason and authority support its claim that the carrier furnished neither labor nor materials to the work. It urges us to re-examine that case, and either disapprove its holding or confine its effect to a bond worded literally and precisely as that one was. It urges upon us, in short, a return to our earlier decision, United States *vs.* Hyatt, 92 Fed. 442, which the Stuart case, though not expressly, has impliedly overruled.
>
> " * * * It will serve no purpose for us to thresh again this old straw. It is sufficient for us to say that we disapprove the ruling and teaching of the Hyatt case. We approved that in City of Stuart."

The same Circuit Court, in the case of City of *Stuart* v. *American Surety Company,* 38 F. (2d) 195, made a similar ruling, and speaking through Circuit Judge Sibley said:

> "Railroad transportation of materials combines the furnishing of work, skill and machinery for the purpose of the contract, even if not labor in the narrow sense originally attributed to the word in the Hyatt case."

These rulings of the Fifth Circuit are directly in conflict with the rulings of the Circuit Court of Appeals for the

Third Circuit in *Mandel* v. *United States*, 4 F. (2d) 629, which case held that under a similar bond, claims of carriers for freight charges did not come within the terms of the statute and bond.

In its opinion, the court said:

> "* * * The words 'labor and material' used by Congress in this statute, are plain words of well understood meaning, and in the common use and acceptance, car demurrage and car freight are not described or embraced by the words 'labor and material'. Moreover, there is no call for the exercise of judicial construction to give to demurrage and freight the protection of this statutory bond.
>
> "* * * We agree with what was said in U. S. *v.* Hyatt, 92 Fed. 445, 34 C. C. A. 447: 'Congress could not have intended to include in the term 'labor' as used in this act, the freight charges of a railroad on materials carried by it. The railroad is abundantly protected by its lien on freight * * *. But conceding this exceptional situation, where the railroad could not enforce its lien—a situation it knew existed—that is no reason why the statute should be given a construction different from what we have seen was its real and proper one."

The ruling of the Fifth Circuit is also in direct conflict with the ruling of the Ninth Circuit in *Title Guaranty and Trust Company* v. *Puget Sound Engine Works*, 163 Fed. 168; 89 C. C. A. 618, in which the Court ruled that freight advanced by a transfer company was not recoverable under a similar bond. In that case, the Court said:

> "We cannot approve, though, of the claim of the Eyres Company for freight money advanced to the carriers and added to the cartage bill."

In view of the ruling of the Court in the *City of Stuart* case (*supra*), and the emphatic language used in the instant

case, petitioner did not file a petition for a rehearing, deeming that such course would avail it nothing.

VI.

Conclusion.

We respectfully submit that the final determination by this Court of the law involved is of the utmost importance to the rights of sureties and common carriers under the bond required to be given in construction and repair of public buildings and works and is of particular importance because of the many building and construction projects being undertaken by the political subdivisions of the various cities.

This question is present in a large number of cases and will involve considerable moneys; that the ruling of the Fifth Circuit is contrary to the law as announced by it in its earlier decisions and is contrary to the ruling in two of the other circuits. That the Statute now in force, being Act of August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 270a, Title 40, uses the same applicable language as the statute which has been repealed and which is in controversy here. (See appendix.)

It is a matter of importance, both to surety companies and the carriers who do a nationwide business, that they be apprised of their rights and liabilities; that their rights may be the same regardless of where the cause of action arises, or is attempted to be enforced, and that their rights not be dependent upon the particular circuit in which they arise or are sought to be enforced.

Unless the conflict be corrected, the effect will be to create irreparable confusion regarding the question, not only in those circuits in which the question has been passed upon, but in those in which it has not.

We respectfully submit, for the reasons stated in the petition and this brief, that application for writ of certiorari should be granted.

GEORGE W. WYLIE,
STUART B. WARREN,
Counsel for Petitioner,
St. Petersburg, Florida.

APPENDIX.

Acts August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 40, Sec. 270a.

"SEC. 270a. SAME; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor".

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000, the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he

finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section. (Aug. 24, 1935, c. 642, Sec. 1, 49 Stat. 793.)

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Supreme Court of the United States

OCTOBER TERM, 1937.

No. 41.

STANDARD ACCIDENT INSURANCE COMPANY,
PETITIONER,

VS.

THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

Petition for Certiorari Filed May 7, 1937.

Certiorari Granted October 11, 1937.

GEORGE W. WYLIE,
STUART B. WARREN,
St. Petersburg, Florida,
Counsel for Petitioner.

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Supreme Court of the United States

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THE UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF L. R. POWELL, JR., AND HENRY W. ANDERSON, AS RECEIVERS, ETC.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

I.

THE OPINIONS OF THE COURTS BELOW.

There was no official opinion written by the district court judge. His action in granting judgment is set forth in the record (Rec. 22). The opinion of the circuit court

of appeals is set forth in the record (Rec. 27, 28) and is reported in 89 F. (2d) 658.

II.

JURISDICTION.

1. The petition for writ of certiorari was filed on May 7, 1937, which set forth that the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case was in direct conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the instant case and in former cases, is in direct conflict with the decisions of the Circuit Court of Appeals in the Ninth Circuit in the case of *Title Guaranty and Trust Company* v. *Puget Sound Engine Works,* 163 Fed. Rep. 168, and in direct conflict with a decision of the United States Circuit Court of Appeals of the Third Circuit in the case of *Mandel* v. *United States,* 4 F. (2d) 629, in which said cases a claim for the allowance of freight bills, under an exactly similar bond, was denied.

2. The statutory provision believed to sustain the jurisdiction of this court is Judicial Code, Section 240a, as amended by the Act of February 13, 1925, 43 Statutes 938 (U. S. C., Title 28, Sec. 347a).

3. Section 240a of the Judicial Code, as amended, clearly confers jurisdiction upon this court to bring up a case of this character from the circuit court of appeals by certiorari and Subparagraph (b) of Paragraph 5 of Rule 38 of this court clearly recognizes such right.

Writ of certiorari was granted on October 11, 1937.

III.

STATEMENT OF CASE.

Your petitioner is the surety on a post-office construction bond given pursuant to Act of August 13, 1894, 28 Statutes 278 and amendments thereto, Title 40, U. S. C. A., Section 270 (repealed with a saving clause and a similar statute, with applicable language substituted therefor, Act August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 40, Section 270a) (see Appendix).

Respondent is a carrier which, having transported materials used in the work, sued upon the bond for its unpaid freight bills (Declaration, Rec. 1 to 20, incl.).

Petitioner's demurrer (Rec. 21) that a railroad company, as to freight charges, is not within the meaning of the bond, "a corporation who has furnished labor or materials used in the construction or repair of any public building or public work" was overruled, and the facts being admitted, judgment went for the respondent in the district court (Rec. 22).

From that judgment, appeal was taken by the petitioner to the United States Circuit Court of Appeals for the Fifth Circuit (Rec. 23), which, after hearing, affirmed the judgment of the United States District Court (Rec. 27, 28, 29) 89 F. (2d) 658.

The only error assigned in the circuit court of appeals in support of petitioner's appeal, questioned the ruling of the lower court in its decision that freight charges were within the meaning of the bond "a cor-

poration which furnished labor or materials used in the construction or repair of any public building or public work."

The petition for writ of certiorari was filed May 7, 1937, and was granted on October 11, 1937 (Rec. 32).

IV.

SPECIFICATIONS OF ERROR.

Assignments of error (Rec. 22) are as follows:

1. The court erred in overruling plaintiff in error's demurrer to the declaration.

2. The court erred in entering final judgment against the plaintiff in error.

V.

ARGUMENT.

FIRST AND SECOND ASSIGNMENTS OF ERROR.

It is our contention that freight charges do not come within the terms of a bond of a contractor on public works exacted pursuant to the Acts of Congress (Section 270, Title 40, U. S. C. A.) conditioned to "make payments to all persons supplying the principal with labor and materials in the prosecution of the work."

On reason and principle "freight" cannot be considered "labor and materials" without doing violence by judicial construction to the plain terms of the statute and bond, and the court should not depart from the language used and read an additional term into the bond, not justi-

fied by the language used and the circumstances of the giving of the bond.

The act in question was originally entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works" (see footnote appended to Sec. 270, Title 40, U. S. C. A.), and should be interpreted in the light of the declared purpose and the conditions existing prior to the enactment of the statute and the evils sought to be cured.

Before the enactment, manual laborers and materialmen had no rights of lien, by statute or otherwise, against public works, as they did against similar private works. Railroad companies, however, had a right at common law —a common law carrier's lien—and could enforce payment of its charges by retaining possession of the goods and selling them to satisfy its charges. Indeed, under the lien laws of the states, railroads have never had any right of lien against private buildings for the payment of freight charges; their lien on the materials being considered sufficient protection. *Seventh National Bank* v. *Shenandoah Iron Co.*, (1887) 35 Fed. 436; *Fidelity Ins. Trust Co., etc.*, v. *Roanoke Iron Co.*, (1896) 81 Fed. 439; *Wisconsin Brick Co.* v. *National Surety Co.*, 164 Wis. 585, L. R. A. 1917C, 912, 160 N. W. 1044.

The act in question has been before this court in the cases of *United States Use of Hill* v. *American Surety Co.*, 200 U. S. 197-205, 50 L. Ed. 437, 26 Sup. Ct. Rep. 168; *Brogan* v. *National Surety Co.*, 246 U. S. 257-263, 38 Sup. Ct. Rep. 250, 62 L. Ed. 703; *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376-383, 61 L. Ed. 1206, ~~36~~ 37 Sup. Ct. Rep. ~~321~~ 614; *Title Guaranty & Trust Co.* v. *Crane Co. et*

al., 219 U. S. 24, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140; *Equitable Surety Co.* v. *U. S.*, 234 U. S. 448, 34 Sup. Ct. Rep. 803, 58 L. Ed. 1395.

In the case of *United States for the Use of Hill* v. *American Surety Company*, 200 U. S. 197-205 (*supra*), this court held for a liberal construction of the bond and allowed claims for labor and materials furnished indirectly to the job, that is, to subcontractors as well as those furnished directly to the contractor. In stating its ruling, this court said (220 U. S. 202):

> "such a contract should be interpreted liberally in favor of the subcontractor with a view of furthering the beneficent object of the statute. Of course, this rule would not extend to cases of fraud * * * or to cases not otherwise under the scope of the undertaking * * * and the rule which permits a surety to stand upon his strict legal rights, when applicable, does not prevent a construction of the bond with a view to determine the fair scope and meaning of the contract in the light of the language used and the circumstances surrounding the parties."

In *Brogan* v. *National Surety Co.* (*supra*), 246 U. S. 257, the court allowed claims for food furnished the contractor to feed his laborers where the site of the work was "in a comparative wilderness and (the contractor) was compelled to furnish board and lodging to his laborers."

In *Illinois Surety Co.* v. *John Davis Co.*, 244 U. S. 376 (*supra*), this court allowed rental price of equipment used by the contractor on the job, which rental price included freight advanced by the owner of the equipment.

In *Title Guaranty & Trust Co.* v. *Crane et al.*, 219 U. S. 24, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140 (*supra*), affirming *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, the claim for which recovery was allowed was for cartage and towage and claims for drawings and patterns. In that case this court said (219 U. S. 34):

> "Next it is objected that certain claims are not entitled to the benefit of the bond, either because they had a lien or because the service was too remote. Of the former class are claims for cartage and towing to the spot where the work was going on. We concur with Judge Putnam in the case of the *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed. 717, that in these smaller matters, the objection, if carried to an extreme, would defeat the purpose of the statute, that such liens ordinarily are not insisted upon and that it would be unreasonable to let the statute interfere with the convenience of minor dealings in such methods as the usual practices establish."

This reasoning, carried to its logical conclusion, would exclude dealings with a railroad company, which has a lien and ordinarily insists on it, by refusing to deliver materials until its claim is paid.

It is significant that the Circuit Court of Appeals of the Ninth Circuit, in the case below, refused to allow a claim for advance of freight (see *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, which ruling this court was not called upon to review) and that this court expressly approved the ruling of Judge Putnam in the *American Surety Co.* v. *Lawrenceville Cement Co. Case*, 110 Fed. 717, who had

denied the claim of a carrier for freight because they were protected by their common law carrier's lien.

We respectfully call the court's attention to the fact that in the foregoing cases, this court has not extended the coverage of the bond to those claimants who were otherwise protected by a common-law lien, and has extended it *only* to those who have indirectly supplied labor and materials necessary to the job and who did not have a lien at common law, and upon whom there was a real hardship in construction on government property.

In *Equitable Surety Co.* v. *U. S.*, 234 U. S. 448, 58 L. Ed. 1395, 34 Sup. Ct. Rep. 803, this court said with reference to the purpose of the statute in question here:

> "The public is concerned not merely because laborers and materialmen (being without the benefit of a mechanics' lien in case of public buildings) would otherwise be subject to great losses at the hands of insolvent or dishonest contractors, but also because the security afforded by the bond has a substantial tendency to lower the prices at which labor and materials will be furnished because of the assurance that the claim will be paid."

This language cannot be construed to cover a common carrier who was already protected by a common-law carrier's lien and who was forbidden by law to grant preferential freight rates.

The rule requiring a contractor's bond to be given a liberal construction does not mitigate the principle that contracts should be so construed as to give effect to the intention of the parties as manifested by the in-

strument, but merely means that in case of ambiguity or doubt as to the meaning of any phrase or term, the doubt is to be resolved against the surety for profit. *Blyth-Forco Co.* v. *Free,* 46 Utah 233, 148 Pac. 427; *Fry* v. *P. Bannion Sewer Pipe Co.,* 179 Ind. 309, 101 N. E. 10; *American Surety Co.* v. *Pauly,* 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. 552; *United States Fidelity & Guaranty Co.* v. *Golden Pressed Brick Co.,* 191 U. S. 416, 48 L. Ed. 242, 24 Sup. Ct. Rep. 142.

In *Wisconsin Brick Co.* v. *National Surety Co.,* 164 Wis. 585, 160 N. W. 1044, L. R. A. 1917C, 912, the Supreme Court of Wisconsin denied a claim for freight under a similar law on the ground that the law was intended to give security to those who otherwise would have no security; not to give additional claim to a party who was amply secured by its carrier's common-law lien.

The Circuit Courts of Appeal of the United States have interpreted the federal statute in question, commonly known as The Heard Act and have denied the claim of a common carrier for freight charges in the following cases: *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works,* 163 Fed. 168 (C. C. A. 9th) (affirmed in *Title Guaranty & Trust Co.* v. *Crane et al.,* 219 U. S. 24, *supra,* without passing on the question). *United States* v. *Hyatt,* 92 Fed. 442 (C. C. A. 5th, since expressly repudiated by the Circuit Court of Appeals for the Fifth Circuit). *Mandel* v. *United States,* (C. C. A. 3rd) 4 F. (2d) 629.

In the *Hyatt Case* (*supra*), the court reasoned that the intent of Congress was to protect "labor used directly upon the public work" and that "Congress could not have intended to include in the term 'labor' as used in the act, the freight charges of a railroad on materials carried by it. The railroad is abundantly protected by its lien on freight and Congress did not contemplate that a charge for transportation by a railroad would be made against the work and certainly not when the carrier was fully secured otherwise."

In the *Title Guaranty & Trust Company* v. *Puget Sound Engine Works* (*supra*) case, the court denied the claim of a transfer company for freight advanced by it, reasoning as did Judge Putnam, in the case of *American Surety Co.* v. *Lawrenceville Cement Co.*, (C. C. D. Maine, Aug., 1901) 110 Fed. 717, which it quotes:

> "First, that the transportation for considerable distances in the regular course, by the ordinary lines of either steam or rail, cannot easily be brought within the words of the statute 'supplying labor or materials,' and, second, inasmuch as carriage of that character, especially under an ordinary bill of lading or its equivalent, creates a well-recognized lien for its freight, the equitable rule would apply that a carrier, under such circumstances, cannot give up his cargo and enforce his claim against a mere surety after he has so placed himself that the surety cannot be subrogated to the security which the law gave."

It is to be noted in this connection that the reasoning of the Lawrenceville case is also quoted with approval by the Supreme Court of the United States in the *Crane Case* (*supra*).

In the Mandel case, the railroad tracks did not extend to the point of discharge but only to the boundary of a government reservation, at which point the cars were turned over to a government railroad and delivered by it to the contractor. Thus the railroad did not have an opportunity to assert its lien, at the time of final delivery. Notwithstanding this hardship, the Court of Appeals of the Third Circuit refused to allow the claim for freight charges, reasoning that the words "labor and materials used by the Congress * * * are plain words of well-understood meaning, and in the common use and acceptance * * * freight and car demurrage are not described or embraced by the words 'labor and materials,'" and, as in the Hyatt case, that the language and purpose of the bond indicated that it was for the protection only of those not otherwise protected; and moreover, that there was no call for the exercise of judicial construction; that "neither the words of the bond allow, nor the spirit and purpose of the law require, that judicial construction to enlarge or construe the words 'labor and materials' so as to 'include freight and demurrage.'"

The materialman who prepays the freight has been allowed freight charges as part of the purchase price, in the cases of *Maryland Casualty Co.* v. *Ohio River Gravel Co.*, 20 F. (2d) 514 (C. C. A. 4th), on rehearing 21 F. (2d) 744; *U. S.* v. *Morgan*, 111 Fed. 474.

In the Ohio River Gravel Company case, the court reasoned that the seller had no common-law lien for freight advanced and was thus within the words of

the bond and spirit of the act. This case does not repudiate the doctrine of the Lawrenceville Cement Company case, for the court was careful to expressly recognize that doctrine and point out the distinction. It is also to be noted that the court did not have before it the precise question which this court now has before it; namely, a construction of the federal statute in question, but had before it a construction of a West Virginia statute.

The Circuit Court of Appeals of the Fifth Circuit, in the case of the *City of Stuart, for the Use of Florida East Coast Railroad Company* v. *American Surety Company,* 38 F. (2d) 193 (the precedent for that court's later decisions), overruled by implication the rule previously declared by it in the *Hyatt Case* (*supra*), in construing a bond given pursuant to a Florida statute.

The court gives as its reasons for extending the operation of the words of the statute by judicial construction so as to cover freight charges, first, that there was no reference in the statute to liens and that protection was expressly extended to all persons who furnished the named things; that the nature of the work done in transportation was not such as to prevent its being labor and that the freight, by whomever paid, enters into the cost of the materials and that the claim of unjust prejudice to the surety was a fallacy because the surety could not take any advantage by way of subrogation.

They justify their extension of the language by judicial construction, by referring to the decisions of the

Supreme Court, some of which are analyzed in this brief and say that that is their justification for a liberal construction.

None of the cases referred to, however, as we have hereinabove pointed out, go so far as to allow freight charges to a common carrier or go so far as to depart from the scope of the words and the spirit of the act. That court completely ignores the fact that neither the words of the bond, nor the spirit and purpose of the law require judicial construction to enlarge or construe the words to include freight.

VI.

CONCLUSION.

In conclusion, it is respectfully submitted that the intention of Congress, as interpreted by this court and by the Circuit Court of Appeals of the Ninth and Third Circuits, was to protect those persons, and only those persons, who would otherwise suffer extreme hardship, that is, those persons who could not protect themselves by obtaining a lien on government property, and for which services they would ordinarily be unable to protect themselves. In view of the fact that railroad companies were otherwise protected, by their lien for freight, there is no call for an extension by judicial construction of the plain words of the act and bond.

The judgment of the court below should be reversed.

Respectfully submitted,

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Counsel for Petitioner.

APPENDIX.

Acts August 13, 1894, c. 280, 28 Stat. 278; Feb. 24, 1905, c. 778, 33 Stat. 811; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167, U. S. C. A. 40.

"Sec. 270. BONDS OF CONTRACTORS FOR PUBLIC BUILDINGS OR WORKS; RIGHTS OF PERSONS FURNISHING LABOR AND MATERIALS.

Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay

the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the department under the direction of which said work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the district court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution; Provided, that where suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later; And Provided Further that where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be

made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing, the surety will be relieved from further liability; Provided Further, that in all suits instituted under the provisions of this section, such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor.

Acts August 24, 1935, Chapter 642, Section 1, 49 Statutes 793, U. S. C. A. 40.

"Sec. 270a. SAME; WAIVER OF BONDS COVERING CONTRACT PERFORMED IN FOREIGN COUNTRY.

(a) Before any contract, exceeding $2,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to

the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor."

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000, the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Nothing in this section shall be construed to limit the authority of any contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

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In The

Supreme Court of the United States

October Term, 1936

No. 958

STANDARD ACCIDENT INSURANCE COMPANY,

Petitioner,

vs.

UNITED STATES OF AMERICA for the use and benefit of L. R. POWELL, JR., *and* HENRY W. ANDERSON, as Receivers of the SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

The statement of the case or matter involved contained in the petition is deemed sufficient.

ARGUMENT

The sole question presented to the courts below and answered by them affirmatively is this:

Are freight charges of a railway company for transporting materials used in the prosecution of the work provided for in the United States construction contract, incurred by the contractor for such work, within the obligation of a bond conditioned, conformably to the statute cited in the petition, for the "payment to all per-

sons supplying the principal with labor and materials in the prosecution of the work"?

It is admitted that the decision which the petitioner seeks to have reviewed is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Mandel, et al., vs. U. S., to use of Wharton and N. R. Co., et al,* (March 19, 1925) 4 Fed. (2d), 629, and with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *Title Guaranty & Trust Co. vs. Puget Sound Engine Works, et al,* (June 10, 1908) 163 Fed., 168; 89 C. C. A., 618. The Third Circuit Court cites as authority for its holding, in the former, the case of *U. S. vs. Hyatt,* 92 Fed., 445; 34 C.C.A., 447, decided by the Circuit Court of Appeals for the Fifth Circuit in 1899 and now expressly overruled by that court in its decision which petitioner seeks to have reviewed. And that is the only authority cited (Text 631). The Ninth Circuit Court cites no authority for its holding in the latter except *dicta* in the opinion in *American Surety Company vs. Lawrenceville Cement Company, et al* (C.C.) 110 Fed., 717. (Text 178).

As pointed out by the Circuit Court of Appeals for the Fifth Circuit in its opinion in the case of *City of Stuart, to Use of Florida East Coast R. Co., vs. American Surety Co. of New York,* 38 Fed. (2d) 193, as well as in its opinion in the case which petitioner seeks to have reviewed, this Court has rejected the theory of strict construction of the statute and bonds executed in pursuance thereof, urged by petitioner in the courts below, and adopted that of a broad and liberal construction of the same. It is upon such principle that the Circuit Court of Appeals for the Fifth Circuit expressly bases its decision of which the petitioner complains. The case in this Court of *Brogan vs. National Surety Co.,* 246 U.S.,

257; 38 S. Ct. 250; 62 L. Ed., 703, (cited by the Circuit Court of Appeals for the Fifth Circuit) cites and discusses the other two cases cited by that court. We particularly direct the Court's attention to the following excerpt from its opinion in that case:

> "In *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 61 L. Ed., 1206, 37 Sup. Ct. Rep. 614, recovery was allowed not only for the rental of cars, track, and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment, and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

And to this excerpt from the opinion of the Circuit Court of Appeals for the Fifth Circuit in the case of *City of Stuart, etc. v. American Surety Co., supra*;

> "Transportation of materials by cart and towboat is uniformly allowed as labor. *United States Fidelity & Guaranty Co. v. United States,* 231 U. S., 237, 34 S. Ct. 88, 58 L. Ed., 200; *Title Guaranty & Trust Co. v. Crane Co.,* 219 U. S. at page 34, 31 S. Ct. 140, 55 L. Ed., 72. In what way can the distance of the transportation or the fact that it is over a specially prepared rail track make it any the less labor? It was held in *Illinois Surety Co. v. John Davis Co.,* 244 U. S. 376, 37 S. Ct. 614, 61 L. Ed., 1206, that, where track and cars and equipment were rented by the contractor, and used by him in transportation for the job, the rental was protected by the bond. If he should charter a railroad or a train, the railroad company could, under this decision, recover. Why not when it furnishes single cars? By all the cases, when a furnisher of material pays the freight, whether bound to do so or because the con-

tractor does not pay, the freight is added to the cost of the material; and protected. See *Maryland Casualty Co. v. Ohio River Gravel Co.* (C.C.A.) 20 F. (2d) 514. The same 'place value' is given the material by the transportation, no matter who pays the freight, and to the same extent is material furnished."

CONCLUSION

We respectfully submit that the question involved has already, in effect, been decided by this Court even though a claim by a railway company for such freight charges as were before the courts below and under a bond such as the one before the courts below has not been before it for allowance, and that, upon the principle established by this Court in the cases above cited, the petition for a writ of certiorari should be denied.

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In The

Supreme Court of the United States

October Term, 1937

No. 41

STANDARD ACCIDENT INSURANCE COMPANY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA, for the use and benefit of L. R. POWELL, JR., and HENRY W. ANDERSON, as Receivers, Etc.,
Respondent.

On Writ of Certiorari to The United States Circuit Court of Appeals for The Fifth Circuit

BRIEF FOR RESPONDENT

PETER O. KNIGHT,
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JOHN BELL,
Counsel for Respondent.

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In The

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No. 41

STANDARD ACCIDENT INSURANCE COMPANY,

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vs.

THE UNITED STATES OF AMERICA, for the use and benefit of L. R. POWELL, JR., and HENRY W. ANDERSON, as Receivers, Etc.,

Respondent.

On Writ of Certiorari to The United States Circuit Court of Appeals for The Fifth Circuit

BRIEF FOR RESPONDENT

PETITIONER'S STATEMENT OF THE CASE IS DEEMED SUFFICIENT.

ARGUMENT

It is our contention that freight charges of a railway company for transporting materials used in the prosecution of the work provided for in a United States construction contract, which charges are incurred by the contractor for such work, are within the obligation of the contractor's bond conditioned, conformably to the statute, (Section 270, Title 40, U. S. C. A.) to "make payments to all persons supplying the principal with labor and materials in the prosecution of the work."

Although not subdivided, the argument contained in petitioner's brief advances two distinct reasons to support the contention therein made. One is that a railroad, in transporting materials for a contractor to be used and actually used in a public building, has not supplied the contractor with "labor and materials" in the prosecution of the work, within the meaning of the statute herein involved and of a contractor's bond conditioned conformably thereto. The other is that common carriers, because of their common law lien for their charges which could be enforced by retention and sale of the materials transported, had sufficient protection, and therefore Congress must not have intended to embrace them within the protective purpose of the act.

The petitioner's demurrer, (R. 21) upon which the judgment here to be reviewed was entered, seems to advance, by the grounds therein contained, only the first of these two reasons assigned in its brief. We shall, however, for the purpose of our agrument, take it that both questions suggested are before this Court for decision.

There is nothing novel in either of these reasons. They both argue for the principle of a strict construction of the statute and bond, such as was originally adopted but has now been repudiated by the Fifth Circuit Court of Appeals. In that Court's opinion in the instant case it announces its adherence to the principle of "a broad and liberal construction of the statute and bond" executed pursuant thereto. The Court determined the case at bar in favor of the respondent carrier by the application to it of that principle.

> "Its (referring to the appellant and petitioner here) argument brings forward all the reasons advanced, in the cases it relies on, for a strict construction of the bond, and a denial to common carriers of

its protection. These reasons, particularly the existence of the carrier's lien and the indirectness of its claim of furnishing, were all examined and rejected in the City of Stuart case, and the cases cited in it, and in later decided cases affirming and approving it. * * * * In addition to the cases it cites, attention may be called to the following cases, either citing it with approval or announcing adherence to the same principle, a broad and liberal construction of the statute and bond." (Citing a number of cases).

It is admitted in petitioner's brief that this Court is committed to a liberal construction of the act and the bonds given under it for the protection of those who furnish labor or materials in the prosecution of public work. An excerpt from its opinion in the case of *Brogan v. National Surety Co.*, 246 U. S., 257; 38 S. Ct. 250; 62 L. Ed., 703, one of the cases cited in petitioner's brief, will suffice for illustration.

> "In *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376; 61 L. Ed., 1206; 37 Sup. Ct. Rep. 614, recovery was allowed not only for the rental of cars, track, and other equipment used by the contractor in facilitating his work, but also the expense of loading this equipment, and the freight paid thereon to transport it to the place where it was used. As shown by these cases, the act and the bonds given under it must be construed liberally for the protection of those who furnish labor or materials in the prosecution of public work."

It seems to us that if the position taken by the Fifth Circuit Court of Appeals is correct, i.e.—that application of this principle of liberal construction to the case at bar necessitates a decision in respondent's favor, and we submit that it is correct, then this Court has already, in effect, passed upon the question before it. That the reasons urged by the petitioner in support of its position are, in reality,

merely reasons for a strict construction of the bond, was also held by the Fifth Circuit Court of Appeals in its opinion in the case above referred to of *City of Stuart for use of Fla. E. C. Ry. Co. v. American Surety Co.*, 38 Fed. (2d) 193, wherein it impliedly overruled its earlier (1899) decision in the case of *U. S. v. Hyatt*, 92 Fed., 442, and first departed from its holding therein. From its opinion in the City of Stuart case:

> "The decisions of the Supreme Court reject the theory of strict construction, and adopt that of liberal construction in the allowance of claims above alluded to. *Illinois Surety Co. v. John Davis Co.*, 244 U. S. 376, 37 S. Ct., 614, 61 L. Ed. 1206; *U. S. Fidelity & Gty. Co. v. U. S.*, 231 U. S. 237, 34 S. Ct. 88, 58 L. Ed. 200; *Brogan v. National Surety Co.*, 246 U. S. 257, 38 S. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776. So do the above cited Florida decisions."

The Florida statute before the Court in that case was there held to be an adoption of the United States statute on the subject.

Reverting to the two reasons above stated, we shall proceed to discuss the first.

It is the first sentence of petitioner's brief that assigns this reason and it is left to stand with little or no supporting argument. This sentence paraphrases the language of the Third Circuit Court of Appeal's opinion in *Mandel v. U. S. to Use of Wharton & N. R. Co.*, 4 Fed. (2d), 629, and reads:

> "On reason and principle 'freight' cannot be considered 'labor and materials' without doing violence by judicial construction to the plain terms of the statute and bond, and the Court should not depart from the language used and read an additional term into the bond, not justified by the language used and the circumstances of the giving of the bond."

The Mandel case is the only one we have found holding that the word *labor* is a "plain word of well-understood meaning, and in the common use and acceptance" freight is not described or embraced by it. The opinion therein cites the case of U. S. v. Hyatt, *supra,* (and that case alone) as authority for its statement that "Congress could not have intended to include in the term 'labor', as used in this act, the freight charges of a railroad on materials carried by it," but not for its restrictive definition of the word "labor." We may consider this statement as obiter dicta because, having excluded such transportation from the well-understood meaning of the word *labor,* there was no occasion for deciding that Congress did not intend to include the transportation in the term labor, as used in the act, because it was too remote. It was held in the Hyatt case only that "The labor which Congress intended to protect, by the act under discussion, is evidently labor used directly upon the public work, claims for which would be made by the laborers primarily against the work; thus impeding, possibly, the prosecution of the work and hampering the government officers."

Now, quoting from the opinion in the City of Stuart case, *supra*:

> "Nor is the nature of the work done in transportation such as to prevent its being labor. Much of what is done by the agents of the railroad company is hard labor, and the doing of the work, even by the use of machines, is recognized as labor under the statute. *Fulghum v. Florida,* 92 Fla. 662, 109 So. 644. Transportation of materials by cart and towboat is uniformly allowed as labor. *United States Fidelity & Guaranty Co. v. United States,* 231 U. S. 237, 34 S. Ct. 88, 58 L. Ed. 200; *Title Guaranty & Trust Co. v. Crane Co.,* 219 U. S. at page 34, 31 S. Ct. 140, 55 L. Ed. 72. In what way can the distance of the trans-

portation or the fact that it is over a specially prepared rail track make it any the less labor?"

Assuming then, and we are confident that this Court will so hold, that the transportation of materials is labor, the first reason advanced by petitioner must fall back upon the question whether the statute contemplates only labor applied *directly* in the prosecution of the work.

The Court of Appeals below refers in its opinion to "the indirectness" of the carrier's claim of furnishing, as being one of the reasons brought forward by the petitioner's argument before it.

Petitioner is here supported by the Hyatt case, (no authorities whatever are cited in the opinion therein) dicta in the case of *American Surety Company v. Lawrenceville Cement Company,* 110 Fed., 717, (supported by no citations) and the decision of the Ninth Circuit Court of Appeals in the case of *Title Guaranty and Trust Co. v. Puget Sound Engine Works,* 163 Fed. 168, which cites with approval the dicta in the preceding case, but no other authority. We find no other cases supporting this contention.

Against these cases we have the following expression of this Court which, we think, alone sufficiently decides the point and fixes the rule. It is found in *Brogan v. National Surety Co.,* 246 U. S., 257, 38 S. Ct. 250, 62 L. Ed. 703, L. R. A. 1918D, 776, and reads: "This Court has repeatedly refused to limit the application of the act to labor and materials *directly* (italics ours) incorporated into the public work." The Supreme Court of Delaware agrees with us for in the recent (1929) case of *State for use of Penn. R. Co. v. Aetna Casualty & Surety Co.,* 145 A. 172, it quotes this same language, followed immediately by the observation, "Though authority may be found to the contrary, yet we think the modern cases are in harmony with the rule thus indicated as settled in the

Supreme Court of the United States." Although this Delaware case involves the statute of that state it is pointed out in the opinion therein that the parties conceded that no difference existed between this statute and the federal statute. The opinion in this case, which is on all fours with the case at bar, contains the most exhaustive and analytical discussion of the entire subject before this Court for decision and the most extensive review of the authorities of any case we have found. The defendant surety's argument there covered the same points as the petitioner's argument in the instant case and one other and it was completely met and refuted.

In the case at bar the materials were consigned and the labor in transporting them was furnished by the use respondents directly to the contractor. (R. 2). A statement on page 5 of petitioner's brief seems to infer that this Court, in holding for a liberal construction of the bond and allowing claims for labor and materials furnished indirectly to the job, had applied the rule only in the instance where the furnishing was to subcontractors rather than directly to the contractor. Such was the situation in the case cited, *U. S. for the use of Hill v. American Surety Co.*, 200 U. S., 197, 50 L. Ed. 437, 26 Sup. Ct. Rep. 168. It was not the situation in the Brogan case above mentioned nor in several of the former decisions of this Court cited by Mr. Justice Brandeis in writing the Court's opinion in that case, for no subcontractors were there involved. It is quite plain that this Court, by use of the word "directly" in the above quoted excerpt from its opinion in the Brogan case, could only have meant "directly" in the sense of proximately contributing to the construction. The following illustration was given in the opinion:

> "The supplies furnished by Brogan under these circumstances were clearly used in the prosecution of

the work, just as supplies furnished for the soldiers' mess are used in the prosecution of war. In each case the relation of food to the work in hand is proximate."

The surety there contended that labor and materials which contribute to construction only indirectly should be excluded. The opinion also cites, for example, *Title Guaranty & T. Co. v. Crane Co.*, 219 U. S. 34, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140, where the claims for which recovery was allowed under the bond included labor by way of cartage and towage of material and *United States Fidelity & Guaranty Co. v. United States*, 231 U. S. 237, 58 L. Ed. 200, 34 Sup. Ct. Rep. 88:

> "where the work contracted for was building a breakwater, recovery was allowed for all the labor at a quarry opened 50 miles away. This included, as the record shows, the labor not only of men who stripped the earth to get at the stone and who removed the debris, but carpenters and blacksmiths who repaired the cars in which the stone was carried to the quarry dock for shipment, and who repaired the tracks upon which the cars moved. And the claims allowed included also the wages of stablemen who fed and drove the horses which moved the cars on those tracks."

In applying the rule thus laid down by this Court to the claim of the respondent in the case at bar, we could not improve upon the reasoning or the expression thereof by the Delaware Supreme Court in its opinion in the case above commented upon of *State for use of Penn. R. Co. v. Aetna Casualty & Surety Co.*, 145 A. 172. Immediately after the above quoted reference in this opinion to this Court's decision in the Brogan case:

> "Reason harmonizes with this result for, taking the particular case in hand as an illustration, the labor of transporting slag to be used in the construction of the road contributed as materially and substantially

to the work's completion as did the labor of dumping, hauling, mixing and spreading it on the ground. The latter is impossible in the absence of the former. There would be as much reason in excluding the one from the term 'labor' performed on the work as the other. It does not seem to us that the services rendered to a contractor can be made to depend on the mere circumstance of the place where rendered for its admission into the category of labor performed in the prosecution of the work. They ought rather to depend on the nature of the services and whether they have in a proximate sense contributed to the work's prosecution and completion.

"With that as the test, labor and materials have been held as not too remote under the circumstances referred to in the cases above cited. That transportation of materials for a contractor in order that he might have them on hand for incorporation in the work is the performing of labor within the meaning of the statute and the bond has been specifically held in Title Guaranty & Trust Co. v. Crane Co., supra, where a claim for cartage and towage was allowed, as well as the claim for drawings and patterns before referred to. In American Surety Co. v. Lawrenceville Cement Co. (C. C.) 110 F. 717, it was held that claims for transportation in the form of trucking and water carriage are within the term 'labor' as used in the statute. And it is to be noted that in some of the cases above cited, labor and materials which were merely collateral to the labor of transporting were allowed, as for instance rent of derricks, lighters and scows.

"It being once granted, as we think under the authorities it must, that services rendered to or for a contractor that bear a proximate relation to the work and materially contribute to its progress and completion, are within the protection of the statute, there can be no satisfactory ground upon which to exclude from it that particular type of proximately contributing work embraced in the descriptive term 'transporta-

tion.' The cases last cited find nothing peculiar in the work of transporting materials which should differentiate it from other classes of work. Nor can we think of any differentiating peculiarity in that sort of work.

"We lay it down therefore as a general proposition that the labor of transporting materials for a contractor to be used and actually used in the work he has engaged to do, comes within the meaning of the term 'labor' as used in such statutes as the one before us.

"Before leaving this branch of the case we pause to observe that in the Lawrenceville Cement Company Case, last cited, though a charge for transportation was allowed, yet a distinction was suggested between labor expended in transporting for a long distance and labor expended in transporting for a short one. This distinction we are unable to accept. It seems to us to discard as a test the essential thing of proximateness to the work's advancement and to substitute therefor the purely irrelevant circumstance of length of distance over which the transportation extends. Length of the haul, upon analysis, can mean only length in time for doing the labor of transporting. No one, however, has ever suggested that the recoverability of a claim for labor ought in any way to depend upon the length of time spent in rendering it. Furthermore, if a distinction is to be drawn between a long haul and a short haul, where is the line of demarcation between the two? We confess that we do not know to what principle of reason resort ought to be had for guidance if distance of the haul is to be accepted as the test of whether it is 'labor' within the statute or not. In U. S., to use of Wharton, etc., R. R. Co. v. Columbus Circle Construction Corp. et al (D. C.) 284 F. 155, the distinction based on the length of the haul was rejected and we think rightly so. The opinion reversing that case in Mandel et al v. U. S., to use of Wharton, etc. R. R. Co. et al 4 F. (2d) 629, left the ruling on the long and short haul distinction untouched, because

under the view taken by the Circuit Court of Appeals it was unnecessary to notice it."

In rejecting the distinction based upon the length of the haul, the New Jersey District Court, in U. S., etc. v. Columbus Circle Constr. Corp., cited above by the Delaware Court, says:

> "but, if it be said that his (referring to Judge Putnam in deciding American Surety Co. v. Lawrenceville Cement Co., also cited above by the Delaware Court) determination did not rest upon the lien theory then the determination must depend on whether the labor was in a long haul or a short haul. If a person hauled goods one mile, it might be labor. If he hauled for 100 miles, it would be something else, or a truck driver bringing material for a distance of 100 miles might be entitled to a lien, and a railroad corporation hauling for 90 miles might not. The law is not so jumpy."

We now pass to a consideration of the second reason advanced by petitioner in support of its position, in the words of the Delaware Supreme Court in its opinion aforesaid:

> "Having arrived at the conclusion that labor, rendered in the transportation for the contractor of materials to be used and actually used by him in the construction of the work covered by his contract, is labor performed within the meaning of the statute and of the bond, and that this is so without regard to the length of the haul, we next turn to the question of whether there is anything peculiar to the situation of a common carrier which ought to take the transportation labor performed by it out of the protection which the general category of transportation services is entitled to enjoy.
>
> "Second, then, is a common carrier, because of anything peculiar to its situation, to be denied the benefit

of the statute? The only ground upon which the suggestion rests that a common carrier is to be differentiated from other types of transporters is that it has a common law lien for its charges whereas others have not."

We refrain from continuing here to quote from this opinion only because the Court may prefer to read from the book and because we have possibly already quoted too copiously from it. All that is said therein is applicable to the argument made in petitioner's brief. The Delaware Court proceeds to point out that what the Fifth Circuit Court of Appeals said in the Hyatt case (the opinion was written before the Hyatt case was overruled) and what the Third Circuit Court of Appeals said in the Mandel case concerning the exclusion of common carriers claims for freight by reason of their lien, could, in each instance, be considered obiter dicta, because these decisions were based upon the views of those Courts that transportation services of a carrier railroad were not labor within the meaning of the statute and bonds, and there was therefore no occasion to discuss the effect upon the claimants' status of the liens which they had. The Hyatt case is further criticized because the holding therein regarding the effect of the carrier's lien was inconsistent with the purpose which the Fifth Circuit Court of Appeals therein imputed to the act, i.e.—to afford such protection that, but for its presence, the prosecution of the work would be impeded and the government officers hampered by refusal of labor or material men to do business with the contractor. The Delaware Court says:

"If common carriers are to be denied this assurance because they have a common law lien will not the result be that materials, necessary for the orderly progress of the work, will be either withheld or often times delayed in delivery, and the state's desire for unimpeded

operation be frustrated? * * * the view of the courts, in adopting the rule of liberal construction seems to be that such acts as these are not grounded, like mechanics' lien statutes, in equitable considerations in favor of claimants, for which reason the rule of liberality of construction prevails. In other words, the protection of claimants would appear to be subsidiary to a purpose broader in scope than the mere securing of payment to them, that purpose being the facilitating of the work's uninterrupted progress to completion. Looking therefore at this purpose which, as much as any other purpose, the act may be said in a substantial sense to have been designed to serve, it would appear that there is more reason to include carriers who have a lien for freight within its protection than to exclude them."

The dicta of Judge Putnam in *American Surety Co. v. Lawrenceville Cement Co.,* 110 Fed., 417, which was quoted, but not approved, by this Court in the case of *Title Guaranty & Trs. Co. v. Crane,* 219 U. S., 23; 31 S. Ct. 140; 55 L. Ed. 72, and which refers to "defeat" of "the practical operation of the statute" and of "the beneficial purpose of the statute, and the practical ends which it is intended to accomplish," is subjected by the Delaware Court to this same criticism for inconsistency.

Petitioner's brief calls attention to the title of the act in question here as originally passed, which was "An Act for the Protection of Persons Furnishing Material and Labor for the Construction of Public Works." The Act was passed in 1894. It was amended in 1905 to read substantially as it appeared in 1933, when the bond here involved was executed and the freight charges here in suit were incurred. (The appendix to petitioner's brief contains full references to the statutes so we will not set them out here.) By the 1905 amendment the following significant clause was inserted, indicating clearly that the

Congress thereby recognized the dual purpose of the bonds required, that is that they were to be performance bonds as well as for the protection of laborers and material men:

> "and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials" etc.

Indeed, since the United States is, by this amendment, given priority for its claims over those of laborers and material men the primary purpose of the act, as so amended, might be said to be the assurance of the completion of the contract.

This amendment is referred to by this Court in its opinion in *United States to use of Hills v. American Surety Co., supra,* as being a material one in that, among other things, it provides for preference in payment in favor of the United States, although, in respect to the class of persons entitled to the benefit of the bond, no material change in the original act was effected thereby. Also referring to this amendment, the Court, in the Brogan case, *supra,* says:

"But the change in phraseology is not significant. The purpose of the amendment was merely to secure to the United States preference over others in the satisfaction of its claim against the contractor."

As thus inferred the duel purpose of the act, even before its amendment, was recognized by this Court, for in the case of *United States Fidelity & Guaranty Co. v. United States,* 204 U. S., 349, 51 L. Ed., 516, (bond given in 1899) it was held that the United States was a real, and not a mere nominal or formal plaintiff in suits by laborers and materialmen upon bonds given under the act, that it had the legal right, was a principal party to the contract and had an interest in the performance of all its provisions. From the Court's opinion:

"It may be that the interests of the government, as involved in the construction of public works, will be subserved if contractors for such works are able to obtain materials and supplies with certainty and promptly. To that end Congress may have deemed it important to assure those who furnish such materials and supplies that the government would exert its power directly for their protection." (The claim in suit was by a furnisher of materials).

The provisions of the bond in suit in that case other than the one that the contractor should promptly make payments to all persons supplying labor and materials in the prosecution of the work, were referred to in this opinion as the "main provisions." In *United States Fidelity & Guaranty Co. v. Golden Pressed Brick Co.,* 191 U. S, 416, 24 Sup. Ct. Rep., 142, 48 L. Ed., 242, it was held that the two covenants of the bond, i.e., for the performance of the contract and for payment to laborers and materialmen should, "of course, be read together, and the latter interpreted in the light of the former." And that case was decided before the 1905 amendment. The influence which

the title of an act of Congress ought to have in construing the enacting clauses was limited by this Court in an early decision, *United States v. Fisher,* (1804) 2 Cranch, 358, 386, 2 L. Ed. 304, 313, which has been followed ever since. The title cannot control plain words in the body of the statute, it may only assist in removing ambiguities.

> "Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice, and will have its due share of consideration."

Although petitioner invokes the title of the act in question in this case, it inconsistently refers repeatedly in its brief to the plain words of the act and bond and urges that the courts below extended the language thereof by judicial construction to include respondent's claim. The Fifth Circuit Court of Appeals certainly did not consider that it enlarged the terms of the act involved in the City of Stuart case, *supra,* by construing it to include the carrier's claim, for it there says:

> "we find in the statute no reference to liens. Protection is expressly extended to *all persons* who furnish the named things, whether under lien or not, whether individual or corporation, rich or poor, etc."

And the Delaware Court, in its opinion hereinbefore quoted, says:

> "In the Mandel Case, the court after saying that transportation charges by a carrier are not within the term 'labor', then proceeds to say that 'there is no call for the exercise of judicial construction' to include carriers within the statutory bond because of the lien they possess. This seems to us to be approaching the matter from the wrong end. It would rather seem

to be more proper to say—the act embracing transportation services generally (as we think must be said under the authorities) is there anything in the situation of a transporter who happens to be able to assert a lien that excepts him from its protection? The inquiry should be, not is the act to be extended to a common carrier but, his class being generally included in it, is there anything peculiar to his situation that should exclude him from it?

As we have said, we can see nothing in the intent or purpose of the act upon which to base his exclusion."

In only one case decided by this Court do we find any reference to the objection to carriers' claims under bonds such as the one here involved because of their liens. That case is *Title Guaranty & Trust Co. v. Crane,* 219 U. S. 24, 55 L. Ed. 72, 31 Sup. Ct. Rep. 140, and it is cited in petitioner's brief (page 7) with an excerpt from the opinion containing the reference. We do not see how petitioner's comments concerning the reasoning of the Court evidenced in the excerpt quoted can be justified. The claims in controversy were allowed. The objection to them was merely noted, not approved. The reference to Judge Putnam's opinion in the case of *American Surety Co. v. Lawrenceville Cement Co.,* 110 Fed. 717, was obviously for the sole purpose of showing that the objection, *even if valid,* was not applicable to the claims under consideration. As hereinbefore stated, Judge Putnam's remarks concerning the carrier's lien were clearly dicta although they were the only authority cited by the Ninth Circuit Court of Appeals for its denial of a claim by a carter for freight money advanced to carriers and added to the cartage bill. *Title Guaranty & Trust Co. v. Puget Sound Engine Works, supra.* The carter, the court said, was "not a common carrier, protected by its lien on freight carried, but was a local transfer company engaged in the business of cart-

age and delivering." Its claim for its own services was allowed. Yet Judge Putnam's remarks, cited and approved as the basis for this decision, were apropos "some minor claims for transportation" consisting of trucking materials from a place of landing to the exact locality of the work under contract and to water carriage "for short distances without the aid of steam or a fully-equipped vessel," and were occasioned by his view, at odds with that of the Ninth Circuit Court of Appeals, that "every person engaged in transportation, who is not a mere servant of the owner of the merchandise transported, holds a carrier's lien, even though the carriage is of miscellaneous parcels, over short distances in the immediate locality, and at frequent, irregular intervals." The claims in controversy were allowed. The remarks relating to "transportation for considerable distances in the regular course, by the ordinary lines of either steam, sail, or rail * * * especially under an ordinary bill of lading, or its equivalent," are expressly an "illustrative suggestion." We have covered the first reason suggested by Judge Putnam for disallowance of claims for such carriage, i.e., that the service was too remote. The second reason he assigned, that such carriage creates a well recognized lien for freight, is advanced only to illustrate the view that it would be inequitable to allow the carrier to give up his cargo and enforce his claim against the surety, after he has so placed himself that the surety cannot be subrogated to the security which the law gave. This view is not urged by petitioner in the case at bar. Judge Putnam makes no reference to the fact of the carrier's lien excluding common carriers' claims for freight because Congress intended to protect only those persons who would, except for the statute, have no protection. That is the contention of petitioner here. The objection founded on the existence of the lien which Judge Putnam suggests was disposed of in this manner by the Fifth Circuit Court

of Appeals in the City of Stuart case, *supra.* After citing the case of *State of Delaware v. Aetna Casualty & Surety Co.,* 145 A. 175:

> "The claim that the surety is unjustly prejudiced by the surrendering of the carrier's lien is there fully examined and exploded. Additionally it may be remarked that the carrier's lien could not be of advantage to the surety by way of subrogation. If by payment he can be subrogated, he could enforce it only against the materials transported, thus keeping them out of the job. Yet the first and most important obligation of the bond is that the material shall be furnished, and the work done, according to the contract. If the materials whose transportation is not paid for are sold, either by the carrier or the surety, in order to satisfy the charges on them, the surety would still be bound to see that they were replaced by other material whose transportation would again have to be paid for. The broad obligation, assumed in the bond, that the contract shall be completed, results in all liens for labor and material being practically unimportant to the surety, except to see that they do not prevent the execution of the work."

We have devoted this considerable space to our criticism of this decision because petitioner construes its citation by this Court as an approval which, under the circumstances, we are sure it was not intended to be.

In *Wisconsin Brick Co. v. National Surety Co.,* 164 Wis., 585, 160 N. W. 1044, cited by petitioner, the Wisconsin Supreme Court construed the statute of that state covering the subject very strictly to give no more extensive remedy than that furnished by the mechanics' lien law, nor to give a remedy to any different classes of persons, stating that there was "every indication that the remedy was intended to be coextensive with the mechanic's lien remedy." The peculiar circumstances evidencing such an intent are

set forth in the opinion. That the situation was unique is evidenced by the failure of the Court to cite a single authority, although (in 1917) there was ample authority construing the federal and other state statutes of similar purpose.

As against the statements, which we believe we may consider dicta, in the Hyatt and Mandel cases, that which is unquestionably dicta in the American Surety Company v. Lawrenceville Cement Co. case, *supra,* and the holding in the Title Guaranty & Trust Co. v. Puget Sound Engine Works case, *supra,* which was also based upon the view that the service was too remote, which view, if valid, would obviate the necessity of giving consideration to the carrier's lien, we have the present holding of the Fifth Circuit Court of Appeals which is backed by clear and cogent reasoning, the Delaware case from which we have quoted so copiously because of the argument contained in the opinion, and the several decisions of this court hereinabove cited which adopt the rule of liberal construction and to our minds clearly indicate what its consistent decision in the instant case must be. The Fifth Circuit Court of Appeals says in the City of Stuart case, *supra*:

> "It was held in Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 37 S. Ct. 614, 61 L. Ed. 1206, that, where track and cars and equipment were rented by the contractor, and used by him in transportation for the job, the rental was protected by the bond. If he should charter a railroad or a train, the railroad company could, under this decision, recover. Why not when it furnishes single cars? By all the cases, when a furnisher of material pays the freight, whether bound to do so or because the contractor does not pay, the freight is added to the cost of the material, and protected. See Maryland Casualty Co. v. Ohio River Gravel Co. (C. C. A.) 20 F. (2d) 514. The same 'place value' is given the material by the transporta-

tion, no matter who pays the freight, and to the same extent is material furnished."

In the case of Maryland Casualty Co. v. Ohio River Gravel Co. cited in the above excerpt, the Fourth Circuit Court of Appeals held that it would "be both unjust and absurd" to hold that the claimant could recover only the value of materials sold the contractor at the point of shipment, when he had advanced the freight to the job and "in effect furnished the material at the place of use by paying the freight charges and having it transported there." The Court said, "And we think that whether the freight was paid in advance under agreement, or whether exacted of claimant under its liability as consignor, makes no difference." Although the Court distinguished the situation before it from that where a common carrier itself is the claimant; how unreasonable it would be to say that the carrier as well could not look to the surety for payment. To the same effect as this case is *U. S. v. Morgan*, 111 Fed. 474. One of the cases cited by the Circuit Court of Appeals for the Fifth Circuit in its opinion below is *United States v. Hercules Co.*, 52 Fed. (2d) 451, wherein Judge Holmes, then District Judge, wrote a particularly well considered opinion.

CONCLUSION

It is respectfully submitted that petitioner has advanced no valid reason why common carriers should be excluded from the benefits of the statute in question when many persons who have a lien enforceable by retention have been held to be within its provisions. That the true purpose of the statute is to minimize impediment and delay of government construction work, and facilitate procurement of labor and materials, through the security afforded by the bond required, as well as to protect the honest claims of those who have contributed to the per-

formance of the work. If the carrier is included in its benefits, this intent will be served. If he is not included, he must hold the freight until payment is made, and sell it for charges if it is not, to the embarrassment of the work.

The judgment of the Court below should be affirmed.

Respectfully submitted,

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Counsel for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 41.—October Term, 1937.

Standard Accident Insurance Company, Petitioner,
vs.
The United States of America for the Use and Benefit of L. R. Powell, Jr., and Henry W. Anderson, as Receivers, etc.

Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 3, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

The petitioner is surety on a post office construction bond given pursuant to the Act of Congress approved August 13, 1894, (c. 280, 28 Stat. 278,) as amended, (Title 40 U. S. C. A. Sec. 270,) which provides—

> "Any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. . . ."

Respondent, common carrier by railroad, having transported material for the structure, sued on the bond to recover freight charges and prevailed in both courts below. They held it was "a corporation who has furnished labor or material used in the construction" of a public building. The correctness of this conclusion is the only question before us.

The cause is here because of conflicting opinions in Circuit Courts of Appeals. *United States, etc.*, v. *Hyatt*, 92 Fed. 442; *Title Guaranty & Trust Co.* v. *Puget Sound Engine Works*, 163 Fed. 168; *Mandel et al.*, v. *United States, etc.*, 4 F. (2d) 629; *Maryland Casualty Co.* v. *Ohio River Gravel Co.*, 20 F. (2d) 514; *City of Stuart* v. *American Surety Co.*, 38 F. (2d) 193; *Standard Accident Insurance Co.* v. *United States, etc.*, 89 F. (2d) 658.

Petitioner maintains that freight cannot be considered as "labor or material" without doing violence to the words of the statute; also that Congress did not intend to extend further protection to carriers who could enforce their lien for charges by retaining and selling the materials.

City of Stuart v. *American Surety Co.*, Circuit Court of Appeals Fifth Circuit (1930), *supra*, carefully considered and denied these defenses and stated reasons therefor which we deem adequate. This was followed by the court below in present cause.

The statute often has been before us. *Guaranty Company* v. *Pressed Brick Co.*, 191 U. S. 416; *United States, etc.*, v. *American Surety Co. of New York*, 200 U. S. 197, 201; *Title Guaranty & Trust Co.* v. *Crane Company*, 219 U. S. 24; *United States Fidelity & Guaranty Co.* v. *United States, etc.*, 231 U. S. 237; *Equitable Surety Co.* v. *United States, etc.*, 234 U. S. 448, 456; *Illinois Surety Co.* v. *The John Davis Co.*, 244 U. S. 376, 383; *Brogan* v. *National Surety Co.*, 246 U. S. 257, 262. And we are committed to the doctrine that it should be liberally construed in aid of the evident public object—security to those who contribute labor or material for public works.

Certainly labor is required for loading freight on railroad cars, moving these over the road, and unloading at destination. A carrier who has procured the doing of all this in respect of material has "furnished labor". If a contractor had employed men to move the same kind of material in wheelbarrows, there could be no doubt that he furnished labor. In principle the mere use of cars and track and a longer haul creates no materially different situation.

Nor do we find reason for excluding the carrier from the benefit of the bond because it might have enforced payment by withholding delivery. The words of the enactment are broad enough to include a carrier with a lien. Nothing in its purpose requires exclusion of a railroad. Refusal by the carrier to deliver material until all charges were paid might seriously impede the progress of public works, possibly frustrate an important undertaking.

State, etc., v. *Aetna Casualty & Surety Co.* (1929)—Delaware—145 Atl. Rep. 172, gave much consideration to a similar statute. The conclusion there reached accords with our view.

The judgment of the court below must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.